86-435

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1986

STOWE-WOODWARD COMPANY,
Petitioner,

vs.

CARL W. VIOCK, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

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QUESTION PRESENTED

Does a state supreme court deny a civil litigant equal protection of the laws by denying review to one person while agreeing to hear an appeal by another, where both appeals seek review of the same substantial legal issue?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Stowe-Woodward Company was defendant below in the trial court, and was appellant in the Ohio Court of Appeals and the Ohio Supreme Court.*

Respondents Carl W. Viock, Bernice Viock, Donna M. Viock, Michael A. Viock, Gene A. Viock and Gloria L. Viock were plaintiffs below in the trial court and were appellees in the Ohio Court of Appeals and the Ohio Supreme Court. The Viocks were also cross-appellants in the Ohio Court of Appeals.

Stowe-Woodward Company (now known as S-W Industries, Inc.) is a wholly owned subsidiary of BTR, Inc., which in turn is owned by Silvertowne Holdings, Inc., and BTR International, Ltd. Silvertowne Holdings, Inc. and BTR International, Ltd. are ultimately owned by BTR, plc, a publicly held corporation.

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*Roger Gravlin was also named as a defendant in the trial court but was dismissed by the plaintiffs.

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No.

In the Supreme Court of the United States

October Term, 1986

STOWE-WOODWARD COMPANY,
Petitioner,

vs.

CARL W. VIOCK, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

Stowe-Woodward Company petitions for a writ of certiorari to review the judgment of the Ohio Supreme Court, entered on July 30, 1986, wherein the Ohio Supreme Court refused to review the decision of March 14, 1986 of the Ohio Court of Appeals for Erie County.

OPINIONS BELOW

The Entry of the Ohio Supreme Court refusing, by a three-three vote with one Justice dissenting, to review the decision of the Ohio Court of Appeals for Erie County is published at 25 Ohio Advance Sheets 3d A4 (August 11, 1986) and appears in Petitioner's Appendix. The March 14, 1986 decision of the Ohio Court of Appeals is unpublished, but appears in Petitioner's Appendix.

JURISDICTION

The Judgment of the Ohio Supreme Court below was entered on July 30, 1986. Petitioner's timely Motion for Clarification and/or Rehearing was overruled by the Ohio Supreme Court on September 10, 1986.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Despite having applied for and received Workers' Compensation benefits for an occupational lung disease, respondent Carl Viock ("Viock"), his wife and several of his children commenced the present action against his employer, petitioner Stowe-Woodward Company. They sought both compensatory and punitive damages against

Stowe-Woodward on a theory that Stowe-Woodward "intentionally" caused the illness.

The Viocks' claim went to trial in May, 1984. Although the Ohio Supreme Court plainly held in *Jones v. VIP Development Co.*, 15 Ohio St. 3d 90, 472 N.E.2d 1046 (1984), that a defendant must act with intent to inflict injury or with substantial certainty that injury will follow, the trial court instructed the jury on the lesser "willful and wanton" standard.

The jury, in answers to interrogatories, found that Stowe-Woodward had acted "intentionally," but that Mr. Viock was 20% responsible for his injury by reason of his voluntarily having returned to work, and found damages of $3.75 million, including $2.5 million in punitive damages. The trial court entered a general verdict and judgment reducing the compensatory damages award by 20% due to Mr. Viock's responsibility for his injury.

On appeal Stowe-Woodward raised as error, *inter alia*, the trial court's erroneous instruction on intent. Over a vigorous dissent by Judge Resnick, the Ohio Court of Appeals for Erie County affirmed the judgment of the trial court, except that it found error in the trial court's award of damages to the Viock children and the reduction of compensatory damages for Mr. Viock's comparative fault. Judge Resnick found plain reversible error in the trial court's charge on the definition of intent.

> The instruction by the court undermined the standard mandated by the Supreme Court of Ohio. . . . [The jury was] not told that they must find that the defendant employer "proceeds despite a perceived threat of harm to others which is *substantially certain*, not merely likely, to occur." *VIP*, *supra*, at 95. . . .

> The instruction which the trial court gave in the case *sub judice* caused the jury to be totally misdirected. Therefore, any finding of the jury is inevitably unreliable. App. p. A52.

Stowe-Woodward timely appealed to the Ohio Supreme Court by filing a motion to certify the record. Stowe-Woodward asserted before the Ohio Supreme Court, *inter alia,* that "in an intentional tort action by an employee against his employer, it is error to submit the case to the jury on a wilfull and wanton misconduct standard." On July 30, 1986 the Ohio Supreme Court overruled Stowe-Woodward's motion to certify the record by a three-three vote, with one justice abstaining. No reason was given for refusing to hear the Stowe-Woodward appeal.

While the Ohio Supreme Court refused to hear Stowe-Woodward's appeal, several months earlier the court did grant a motion to certify the record in a case raising the same issue, *Whisler v. Dallas & Mavis Forwarding Company,* Case No. 85-1808 (motion to certify granted January 15, 1986). Like Stowe-Woodward, the appellant in *Whisler* raised as an assignment of error the improper application of the definition of intent stated in *Jones.* In *Whisler* the Ohio Court of Appeals held that under that definition a jury issue was created when the evidence showed that the employee, in disregard of standard practice, performed a task in a dangerous manner.

Stowe-Woodward filed a motion for clarification and/or reconsideration from the Ohio Supreme Court's Entry of July 30, 1986. The Ohio Supreme Court overruled the motion without stating any reasons for its decision on September 10, 1986.

REASONS FOR GRANTING THE WRIT

THE OHIO SUPREME COURT'S ARBITRARY AND CAPRICIOUS REFUSAL TO HEAR STOWE-WOODWARD'S APPEAL WHILE AT THE SAME TIME AGREEING TO REVIEW ANOTHER CASE RAISING THE SAME SUBSTANTIAL ISSUE OF LAW IS A DENIAL OF EQUAL PROTECTION

Although review of civil cases by the Ohio Supreme Court is discretionary, that discretion may not be exercised in an arbitrary or capricious manner which results in some litigants being granted plenary review while other litigants, raising the same substantial issue of law, are denied any review. The Ohio Supreme Court has agreed to review *Whisler v. Dallas & Mavis Forwarding Company*, Case No. 85-1808 (motion to certify granted January 15, 1986), a case which raises the issue of the proper definition of intentional tort. Nonetheless, the Ohio Supreme Court has, for no stated reason, refused to afford Stowe-Woodward comparable review on the same issue. This denial of equal protection justifies review, and reversal, of the Ohio Supreme Court's decision by this Court.

The Fourteenth Amendment of the Constitution imposes on the courts of each state an affirmative obligation to afford all litigants, corporate as well as individual, equal protection of the laws. Equal justice under law is "more than a maxim carved in marble"; it is a fundamental principle that "serve[s] as indirect guardian of virtually all constitutional values." L. Tribe, AMERICAN CONSTITUTIONAL LAW 991 (1978).

Equal protection mandates that all civil litigants be given equal access to appellate review. In *Lindsey v. Normet*, 405 U.S. 56 (1972), this Court stated:

> This Court has recognized that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review [citations omitted] and the continuing validity of these cases is not at issue here. *When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause.*

405 U.S. at 77 (emphasis added). *Accord, Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956); *In Re Brown*, 439 F.2d 47, 51 (3d Cir. 1971).

This Court has long recognized the right of all litigants coming before it to have their appeals decided on the same basis. When several petitioners raise the same or similar issues this Court holds those cases until it reaches a resolution of the merits of the issue. This procedure assures that all litigants are judged by the same standards of law. R. Stern, E. Gressman & S. Shapiro, SUPREME COURT PRACTICE 221, 274 (6th ed. 1986). *See, e.g., Keney v. New York*, 388 U.S. 440 (1967), where a petition for certiorari in an obscenity case was held nearly two and a half years until decisions were reached in similar cases. The Ohio Supreme Court, by not observing this procedure in the present case, denied Stowe-Woodward the right to have its case decided by the same law as will be applied in *Whisler*.

The seriousness of the issue which both Stowe-Woodward and *Whisler* present magnifies the injustice in-

herent in the Ohio Supreme Court's refusal to treat both litigants equally. Both the Viocks and the plaintiff in *Whisler* brought actions under an "intentional tort" exception to the exclusivity provision of Ohio's Workers' Compensation Act. This exception was first recognized in *Blankenship v. Cincinnati Milacron Chemicals, Inc.*, 69 Ohio St. 2d 608, 433 N.E.2d 572 (1982). *Blankenship* did not define what was meant by the term "intentional tort." In *Jones v. VIP Development Co.*, 15 Ohio St. 3d 90, 472 N.E.2d 1046 (1984), the Ohio Supreme Court defined intentional tort thus:

> An intentional tort is an act committed with the intent to injure another, or committed with the belief that such injury is substantially certain to occur.

The proper meaning of the definition adopted in *Jones* has continued to be a point of heated contention in Ohio jurisprudence. *See Bradfield v. Stop-N-Go Foods, Inc.*, 17 Ohio St. 3d 58, 477 N.E.2d 621 (1985). By accepting the *Whisler* case for review the Ohio Supreme Court has recognized the importance of the issues raised by both Stowe-Woodward and the appellant in *Whisler*. In a recent opinion one Justice of the Ohio Supreme Court pointed out the importance of *Whisler*:

> This court, as it has been constituted since January 2, 1985, has not had a suitable opportunity to review the *Jones* decision. As discussed previously herein, the case now before us likewise does not present such an opportunity as it was decided in the trial court solely on the exclusive remedy issue and on a motion for summary judgment. The reversal in the court of appeals was, likewise, on that basis. Recently, this court agreed to hear the case of *Whisler, Admx.*,

> Appellee, v. *Dallas & Mavis Forwarding Co., Inc.*, Appellant. The issue in *Whisler* involves the first paragraph of *Jones* regarding the definition of "intentional tort." *Whisler* will require *this* court to review that portion of the *Jones* decision.

Egan v. National Distillers & Chemical Corp., 25 Ohio St. 3d 176, 191, 495 N.E.2d 904, 916 (1986) (Douglas, J., concurring).

Thus, by accepting *Whisler* for review while at the same time refusing review to Stowe-Woodward, the Ohio Supreme Court is denying Stowe-Woodward an equal opportunity to have its liability judged by the same standard as the appellant in *Whisler*. The appellant in *Whisler* is allowed the opportunity to argue for a proper application of the intentional tort doctrine to its case, and to benefit from a decision clarifying that doctrine by the ultimate interpreter of Ohio law, whereas Stowe-Woodward is denied that same opportunity for relief. The unconscionability of this result is only compounded by the Ohio Supreme Court's failure to state any principled reason for its disparate treatment of litigants raising the same substantial issues.

The effect on Stowe-Woodward is dramatic and irremedial. It is stripped of its constitutional right to equal protection of the laws, is subjected to a judgment by an arbitrary and changing standard acknowledged to be in need of clarification by the Ohio Supreme Court, and will be required to satisfy a judgment in excess of $3 million, which by hindsight may well be determined to be erroneous. On the other hand, a grant of review by the Ohio Supreme Court will preserve the rights of all parties, assure equal protection of the laws and assure application of a uniform standard of liability in intentional tort cases.

This Court has consistently stood ready to reverse state court decisions which contravene the guarantees of equal protection. In *Lindsey v. Normet, supra,* this Court reviewed and held unconstitutional a state rule which burdened the ability of some civil litigants to bring civil appeals. If the Ohio Supreme Court's decision not to hear Stowe-Woodward's appeal is allowed to stand it will mean that two litigants, presenting the same issue to the same court at the same time have no assurance of having their conduct judged by the same standard. Such a result is patently contrary to both the letter and the spirit of the Fourteenth Amendment. Stowe-Woodward respectfully submits that the same fundamental concerns of equal protection addressed in *Lindsey* are raised in the present case and warrant full review of this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

JUDGMENT ENTRY OF THE SUPREME COURT OF OHIO OVERRULING MOTION TO CERTIFY AND DISMISSING APPEAL

(Dated July 30, 1986)

Case No. 86-729

THE SUPREME COURT OF OHIO
COLUMBUS

CARL W. VIOCK, *et al.*,
Appellees,

v.

STOWE-WOODWARD COMPANY,
Appellant.

ENTRY

Upon consideration of the motion for an order directing the Court of Appeals for Erie County to certify its record and the claimed appeal as of right from same said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $20.00, paid by Squire, Sanders & Dempsey.

/s/ FRANK D. CELEBREZZE
Chief Justice

Locher, Holmes and Wright, JJ., dissent.

Douglas, J., not participating.

OPINION OF THE COURT OF APPEALS OF ERIE COUNTY, OHIO

(Decided March 14, 1986)

C.A. No. E-84-27
C.P. No. 44358

IN THE COURT OF APPEALS OF ERIE COUNTY

CARL W. VIOCK, *et al.*
Plaintiffs-Appellants
Cross-Appellees

v.

STOWE-WOODWARD COMPANY,
Defendant-Appellee
Cross-Appellant

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OPINION

HANDWORK, *J.* This case is before the court on appeal from a judgment entered by the Erie County Court of Common Pleas on June 26, 1984. In that judgment, the trial court awarded plaintiff Carl Viock $600,000 in compensatory damages for injuries suffered during his employment with defendant Stowe-Woodward Company. The court further ordered Stowe-Woodward to pay Bernice Viock, Carl's wife, $320,000 for loss of consortium. The

four dependent Viock children were each awarded $20,000 for their loss of parental consortium. Finally, Stowe-Woodward was also ordered to pay the Viocks $2,500,000 in punitive damages.

This case arose as a result of debilitating permanent lung injuries suffered by Carl Viock[1]. Viock alleged that his injuries were intentionally caused by Stowe-Woodward, his employer, inasmuch as he was continually exposed to dangerous levels of highly toxic chemicals at his particular job site within the Stowe-Woodward plant. Stowe-Woodward was allegedly aware of the dangerous nature of such exposure, yet refused to take proper measures to insure Viock's safety. In addition to Carl Viock's claim, Bernice Viock and the dependent Viock children sought damages for loss of consortium.

Carl Viock worked for Stowe-Woodward from January, 1968 until he was given a medical discharge by the company in June, 1981. During that time, he worked as a "roll-coverer," cementing strips of rubber to revolving steel drums. This job required Viock to brush highly volatile, toxic cements and solvents[2] onto the drums and layers of rubber. Viock was additionally exposed to various congestive dusts[3] that were released into the air by the rubber fabricating process.

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1. Viock's lung disease is characterized by the excessive formation of scar tissue on the air sacks of the lungs. The scarring, caused by dust and solvents, prevents the oxygen and carbon dioxide exchange between the very thin tissue of the air sacs.

2. The cements and solvents to which Viock was exposed to daily included, but were not limited to, toluene (aka toluol), petroleum napha, 2-butanone (aka methyl ethyl ketone), hexane (aka n-hexane) and heplane (aka n-heptane).

3. The dust to which Viock was exposed on a daily basis included carbon black, silicone dioxide, hydrated amorphus silicone dioxide, and talc.

Testimony at trial revealed that, in late January, 1976, Viock was hospitalized with breathing problems, chills, and fever. During his hospitalization he was diagnosed as having suffered a serious lung injury as a result of his continual exposure to chemicals at work. Although Stowe-Woodward contends that Viock concealed the nature of his lung condition, on April 7, 1976 Viock submitted a work-release slip from his doctor, indicating that he should work only in a chemical- and dust-free environment. Because of this restriction, and Stowe-Woodward's contention that the prescribed environment did not exist within the plant, Stowe-Woodward would not allow Viock to return to work. Being unable to find other work, and faced with the prospect of being forced from work at Stowe-Woodward, Viock had his doctor remove the restriction; nevertheless, the work-release slip which allowed his return to work clearly identified Carl Viock's injury as "Diffuse Pulmonary Infiltrate, Bilateral: probably secondary to chemical pneumonitis."

After his return to work, Carl Viock continued to cough and display symptoms of lung distress. Additionally, he was required to leave the plant during his lunch breaks, on a daily basis, to self-treat his condition on an IPPB, a machine used to clear his congested lungs and help his breathing. During numerous discussions with the plant manager concerning his lung problem, the manager even suggested that Viock might be able to bring the IPPB into the plant so that Viock would not have to leave work every day.

In September, 1976, Viock filed a claim for workers' compensation, alleging that his lung problems constituted an occupational disease. An accompanying affidavit identified the chemicals used in Viock's work and suggested

that their inhalation caused his disease. This claim was allowed in January, 1979.

Concurrent to these actions, the workers' union representative made repeated requests to have the roll-coverer area ventilated with exhaust fans. In response to these requests, Stowe-Woodward offered Viock a respirator and placed a portable fan near his work area.

Finally, in May, 1981 Stowe-Woodward requested that Viock be examined by a company physician. The examining physician concluded that Viock's condition had deteriorated to the point where Viock could no longer return to his job at all. Accordingly, on June 1, 1981 Viock was terminated as an employee of Stowe-Woodward. This suit followed.

The Viocks initially filed their respective claims in the Erie County Court of Common [Pleas] on February 5, 1982, naming as defendants Stowe-Woodward and Roger Gravlin, the Stowe-Woodward plant manager. On April 13, 1983, the trial court entered summary judgment for Stowe-Woodward and Gravlin, holding that Carl Viock's injury claim was barred by the statute of limitations. The trial court further dismissed the rest of the complaint without comment. Upon appeal, this court determined that the statute of limitations governing Carl Viock's injury claim was two years[4] and that when those two years began to run was a question of fact to be determined by the trier of fact. This court further determined that the consortium claim was governed by a four-year statute of limitations,[5] again to be determined by a trier of fact. Accordingly, the judgment was reversed and remanded to the trial court.

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4. See R.C. 2305.10.
5. See R.C. 2305.09(D).

This case was ultimately brought to trial on May 14, 1984. Following a lengthy trial (which produced seven volumes of transcripts) the court gave jury instructions that included a comparative negligence charge. Following this charge, the jury was presented with fifteen interrogatories prepared by the parties with, ostensibly, the mutual understanding that a general verdict would not be returned by the jury, but rather that the court would then enter a verdict based upon the findings in the interrogatories. On June 6, 1984, the jury returned these answers,[6] finding that the total monetary amount that would compensate Carl Viock was $750,000; Bernice Viock was found to have suffered $400,000 in damages for loss of consortium; the Viock children were found to have suffered $25,000 in compensatory damages each for loss of parental consortium. Moreover, based upon the comparative negligence instruction, Carl Viock was found to be 20% responsible for his condition and Stowe-Woodward was 80% responsible for his condition. Stowe-Woodward was also assessed $2,500,000 in punitive damages.

On June 26, 1984, the trial court entered final judgment for Carl Viock and his family.[7] In so ruling, the trial court reduced the jury's compensatory award to the plaintiffs by 20% each in accordance with the jury's findings on comparative negligence. This appeal followed.

Carl Viock and his family, appellants-cross-appellees, set forth as their sole assignment of error:

"THE COURT ERRED IN REDUCING THE COMPENSAOTYR [*sic*] DAMAGE VERDICT OF THE JURY BY TWENTY PERCENT (20%) ON THE

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6. See interrogatories (Appendix A).

7. Defendant Roger Gravlin was dismissed as a party to this case.

BASIS THAT THE PRINCIPLE OF COMPARATIVE NEGLIGENCE APPLIED."

In turn, Stowe-Woodward, appellee-cross-appellant, sets forth as its eleven cross-assignments of error:

"I. THE COURT BELOW ERRED IN REFUSING TO SUBMIT GENERAL VERDICT FORMS TO THE JURY, IN INSTRUCTING THE JURY THAT IT DID NOT HAVE TO RENDER VERDICTS AND IN ENTERING JUDGMENT FOR PLAINTIFFS WITHOUT THE JURY FIRST HAVING RENDERED GENERAL VERDICTS.

"II. THE COURT BELOW ERRED IN SUBMITTING INTERROGATORIES TO THE JURY IN PREJUDICIAL SEQUENCE, WITHOUT PROPER INSTRUCTIONS ON HOW TO ANSWER THEM, AND IN REFUSING TO SUBMIT NARRATIVE FORM INTERROGATORIES ON DETERMINATIVE ISSUES OF FACT PROPOSED BY S-W.

"III. THE COURT BELOW ERRED IN REFUSING TO INSTRUCT THE JURY THAT IN AN INTENTIONAL TORT ACTION BY AN EMPLOYEE AGAINST THE EMPLOYER, PLAINTIFF MUST PROVE THAT THE EMPLOYER KNOWINGLY PERFORMED OR AUTHORIZED A DELIBERATE ACT WITH THE INTENT TO INJURE ANOTHER OR WITH THE BELIEF THAT SUCH INJURY WAS SUBSTANTIALLY CERTAIN TO OCCUR.

"IV. THE COURT BELOW ERRED IN ENTERING JUDGMENT FOR PLAINTIFFS WHEN THE CLEAR AND MANIFEST WEIGHT OF THE EVIDENCE FAILED TO ESTABLISH THAT S-W ACTED WITH THE INTENT TO INJURE CARL VIOCK OR WITH

THE BELIEF THAT INJURY WAS SUBSTANTIALLY CERTAIN TO OCCUR.

"V. THE COURT BELOW ERRONEOUSLY CHARGED THE JURY ON THE DUTY OF AN EMPLOYER TO EXERCISE REASONABLE AND ORDINARY CARE AND TO FURNISH A SAFE EMPLOYMENT, THEREBY ESTABLISHING A NEGLIGENCE RATHER THAN AN INTENTIONAL TORT STANDARD OF CONDUCT.

"VI. THE COURT BELOW ERRED IN ENTERING JUDGMENT FOR PLAINTIFFS WHEN THE CLEAR AND MANIFEST WEIGHT OF THE EVIDENCE AND THE JURY'S ANSWER TO INTERROGATORY NO. 13 ESTABLISHES THAT VIOCK CONSENTED TO THE ALLEGED TORT OF BATTERY BY VOLUNTARILY GOING BACK TO WORK WITH KNOWLEDGE OF THE DANGERS HE PERSONALLY FACED FROM ADDITIONAL EXPOSURE TO DUST AND CHEMICALS.

"VII. THE COURT BELOW ERRED IN ENTERING JUDGMENT FOR VIOCK WHEN THE CLEAR AND MANIFEST WEIGHT OF THE EVIDENCE ESTABLISHES THAT HIS ACTION WAS BARRED BY THE ONE-YEAR STATUTE OF LIMITATION CONTAINED IN R.C. §2305.11(A) OR, IN THE ALTERNATIVE, BY THE TWO-YEAR STATUTE OF LIMITATION CONTAINED IN R.C. §2305.10.

"VIII. THE COURT BELOW ERRED IN ENTERING JUDGMENT FOR VIOCK'S CHILDREN FOR LOSS OF PARENTAL CONSORTIUM AND IN ALLOWING THE TESTIMONY OF VIOCK'S SON WHEN OHIO LAW DOES NOT RECOGNIZE A CHILD'S CLAIM FOR LOSS OF A PARENT'S CONSORTIUM. IN

ADDITION, IF THE COURT WERE TO CREATE SUCH AN ACTION, THE CLAIMS OF VIOCK'S CHILDREN WOULD BE BARRED BY THE STATUTE OF LIMITATION CONTAINED IN R.C. §2305.09(D).

"IX. THE COURT BELOW ERRED IN ENTERING JUDGMENT FOR BERNICE VIOCK FOR THE LOSS OF CONSORTIUM WHEN THE JURY'S ANSWER TO INTERROGATORY NO. 14 ESTABLISHES THAT HER ACTION WAS BARRED BY THE FOUR-YEAR STATUTE OF LIMITATION CONTAINED IN R.C. §2305.09(D).

"X. THE COURT BELOW ERRED IN ENTERING JUDGMENT FOR PUNITIVE DAMAGES WHEN UNDER OHIO LAW NO SUCH DAMAGES CAN BE RECOVERTD IN THE ABSENCE OF ACTUAL MALICE, HATRED OR ILL WILL, A SPIRIT OF REVENGE, RETALIATION OR RECKLESS DISREGARD OF THE LEGAL RIGHTS OF OTHERS AND NO SUCH ELEMENTS WERE ESTABLISHED IN THIS CASE.

"XI. THE COURT BELOW ERRED IN ENTERING JUDGMENT FOR PAST AND FUTURE LOSS OF WAGES WHEN SUCH LOSSES CANNOT BE RECOVERED IN AN INTENTIONAL TORT ACTION BY AN EMPLOYEE AGAINST AN EMPLOYER."

We begin our analysis by examining Stowe-Woodward's cross-assignments of error prior to the sole Viock assignment of error:

In Stowe-Woodward's first assignment of error, it argues that the trial court committed prejudicial error in failing to submit a general verdict form along with

the fifteen interrogatories to the jury at the close of testimony. Stowe-Woodward rests this argument on what it perceives to be the mandatory and unalterable rules set forth in the Ohio Rules of Civil Procedure governing verdicts, to wit:

"RULE 49 VERDICTS: INTERROGATORIES

"(A) General Verdict. A general verdict, by which the jury finds generally in favor of the prevailing party, shall be used.

"(B) General Verdict Accompanied by Answer to Interrogatories. The court shall submit written interrogatories to the jury, together with appropriate forms for a general verdict, upon request of any party prior to the commencement of argument. Counsel shall submit the proposed interrogatories to the court and to opposing counsel at such time. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the interrogatories shall be submitted to the jury in the form that the court approves. The interrogatories may be directed to one or more determinative issues whether issues of fact or mixed issues of fact and law.

"The court shall give such explanation or instructions as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict.

"When the general verdict and the answers are consistent, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When one or more of the answers is inconsistent with the general verdict, judgment may be entered pursuant

to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial.

"(C) Special Verdicts abolished. Special verdicts shall not be used."

See, also, Civ. R. 48 and 58.

As our research indicates, the precise issue of whether a general verdict form *must* be submitted in each and every jury case has never been addressed by our Supreme Court. Indeed, because the paucity of case law in Ohio on this point may be due to the uniqueness of factual situations similar to those as presented here, we pause to point out the salient facts pertinent to this issue.

At the close of testimony in this case, but prior to the reading of jury instructions, counsel for both parties discussed the procedure to be used in reaching a verdict. At that time the court specifically informed counsel, "I don't intend to give the Jury any verdict forms at all, just interrogatories." Counsel for Stowe-Woodward then replied, "Okay, thank you * * *" Later, toward the conclusion of giving the jury its instructions, the court stated to the jury, "Now you will note that you as a Jury do not render a verdict for either party in this case. Your duty is to answer the interrogatory [*sic*] submitted * * *"

As the jury then prepared to retire to the jury room, the court paused to ask of counsel, "Now, my last question, anything further from counsel?" While counsel for the Viocks stated that they had nothing to add, counsel for Stowe-Woodward stated, "Is it clear to the jury that what they are doing is really giving us an advisory opinion

* * *?" Soon thereafter the jury retired to consider its answers to the interrogatories. When it returned, the jury had found that the Viocks had, collectively, suffered well over a million dollars in compensatory damages and that the jury would assess 2.5 million dollars in punitive damages against Stowe-Woodward. As the court was then preparing to release the jury from duty, it stated once again, "You were told you were not gonna [*sic*] return a verdict, you're gonna [*sic*] answer a bunch of questions, and you have not returned a verdict." At no time did counsel for either party object to this procedure.

Finally, on June 26, 1981, the day that the court returned its own verdict, and nearly three full weeks after the jury had returned its answers to the interrogatories, Stowe-Woodward requested that a mistrial be granted. The grounds cited for said mistrial were that the court had failed to submit a general verdict form, pursuant to Civ. R. 49, to the jury.

In short, it appears that both of the parties and the court fully intended that the court render the final verdict, based upon the factual conclusions of the jury. This appearance is supported by the fact that Stowe-Woodward not only agreed to the procedure, but that it actively encouraged the court to allow the jury to function solely in a fact-finding capacity. Only after the court entered judgment against them did Stowe-Woodward object. With these facts in mind, we shall consider the merits of this assignment of error.

In support of its interpretation of Civ. R. 49 (at least upon appeal), Stowe-Woodward cites *Ragone v. Vitali & Beltrami, Jr., Inc.* (1975), 42 Ohio St. 2d 161, as standing for the proposition that trial courts "in Ohio have no discretion in deciding whether to submit general verdict forms

to the jury." We find this reliance misplaced. Stowe-Woodward represents to this court that the Supreme Court's ruling in that case reads, "* * * a court 'shall submit written interrogatories to the jury, together with appropriate forms for a general verdict, upon request of any party * * *' " In fact, the first syllabus of the *Ragone* case actually holds "a court 'shall submit written interrogatories to the jury * * * upon the request of any party prior to the commencement of argument' * * *" *Ragone, supra,* paragraph one of the syllabus. A narrow interpretation of the holding in that case, with the noted omission, indicates that the Supreme Court was not speaking of general verdict forms in that case. We are not prepared to expand *Ragone* to support Stowe-Woodward's proposition in the case *sub judice.* To the contrary, we choose to examine the language of Civ. R. 49, and its ramifications, anew.

As previously noted, Civ. R. 49(A) states that general verdicts "shall" be used. This court readily acknowledges that the word "shall" is generally interpreted as a word implying a mandatory act or compulsion, and does not give recourse to discretionary acts. See, *e.g., Dorrian v. Scioto Conserv. Dist.* (1971), 27 Ohio St. 2d 102, paragraph one of the syllabus. Under this interpretation, it would appear that a general verdict form was, indeed, required in this case. Given the special circumstances of this case, however, in particular the parties' mutual desire that the court render a verdict, we are loathe to allow justice to become a slave to grammar. Several jurisdictions, albeit none within this state, have, under certain circumstances, agreed with our position that strict adherence is not always mandatory.

At the outset of this discussion we note that the Ohio Rules of Civil Procedure clearly parallel the federal rules.

Accordingly, the parameters of any Ohio rule can be determined in part by examining corresponding applications of the parallel federal rule. Additionally, the Civil Rules of Procedure are entitled to liberal construction. See, *e.g., Blackwell v. Internatl. Union, U.A.W.* (1983), 9 Ohio App. 3d 179. In examining the construction of the Ohio Rules, we are initially led to Civ. R. 1(B), which clearly states that the rules "shall be construed and applied to effect just results by eliminating delay, unnecessary expenses, and all other impediments to the expeditious administration of justice." Thus, the courts of Ohio are instructed from the outset to examine and embrace the entire scope of a legal dispute and to provide a remedy that will address all proven, compensable wrongs. As the Ohio Supreme Court has pointed out, in order to fulfill the basic theme of justice espoused by our judicial system, " 'cases should be decided upon their merits' rather than upon procedural niceties and technicalities." *Brooks v. Rollins* (1984), 9 Ohio St. 3d 8, 12 (J. Brown concurring); see, also, *Perotti v. Ferguson* (1983), 7 Ohio St. 3d 1, concurring opinion at pages 3 and 4.[8] With these considerations marking our starting point, we continue.

As one federal court noted, "[a]lthough procedural forms constitute an integral part of the judicial process, to be vigorously enforced, they should not serve as impediments to achieving an efficient and just resolution of disputes through the trial mechanism." *United States v. State of Texas* (E.D. Tex., 1981), 523 F. Supp. 703, 724. Further,

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8. Indeed, this court has itself previously adopted a similar posture in the interests of justice. In the case of *Sherri K. Harris v. Churchill's Supermarkets, Inc.* (Oct. 4, 1985), Lucas App. No. L-84-406, unreported, this court permitted the appellate record to be supplemented, per stipulation of the parties, with depositions that were never properly made a part of the record below prior to appeal.

the Fifth Circuit, when forced to interpret the mandatory parameters of "shall" in a procedural context, recently noted the "rules are not designed to be enforced mechanically when no prejudice results from their non-observance." (Citations omitted.) *United States v. Onu* (C.A. 5, 1984), 730 F. 2d 253, 256.

In determining when the application of a rule, and that rule's specific language, may result in prejudice or injustice, we are enlightened by Justice Harlan. In *Hanna v. Plumer* (1965), 380 U.S. 460, 477 (concurring opinion), Harlan suggested that procedural rules have no effect upon substantive rights. In turn, a substantive right is defined as one which, "if all the facts were stipulated, would be meaningful in analyzing the rights and liabilities of the parties to a dispute * * *." *Boggs v. Blue Diamond Coal Co.* (E.D. Kentucky), 1980 497 F. Supp. 1105, 1120. Stated another way "[w]hen a rule of law is one which would affect a person's conduct prior to the outset of litigation and has no design to manage ongoing litigation, it is a rule of substance, rather than procedure." *McCollum Aviation, Inc. v. CIM Associates, Inc.* (S.D. Florida, 1977), 438 F. Supp. 245, 248. See, also, *Synanon Church v. United States* (D. DC., 1983), 557 F. Supp. 1329, 1330. Applying this rationale in the case *sub judice*, we conclude that the use of a general verdict form is a procedural device, inasmuch as it does not determine any substantive rights of the parties; rather, it is a device used to manage litigation. Accordingly, we conclude that "shall" need not be applied in a compulsory manner at all times.

Also, the parties agreed, in essence, that a general verdict form would *not* be submitted at the close of trial. Upon appeal, Stowe-Woodward is now questioning whether

it had the legal ability to assert [sic] to such an agreement. We can only conclude that it could. It is, after all, common for litigants to agree to use procedural settlement devices not provided for within the formalized rules of procedure, for example, the submission to binding arbitration or agreeing to submit to one jurisdiction's laws over another. Clearly, in such a case as this, "[w]here a recognized procedural device has the potential to conserve judicial resources while expediting resolution of claims *on the merits,* [emphasis added] we find that the more appropriate inquiry is whether there is any persuasive reason *against* [emphasis in original] its use." *Neely v. United States* (C.A. 3, 1976), 546 F.2d 1059, 1067.

Is the use of a jury in an advisory or fact-finding capacity a recognized procedural device? Although few courts have adopted precisely the procedure provided for in this particular case, it is clear from the statutory law and the courts using similar devices, that it is. See, *e.g.*, Civ. R. 39(B) and (D) and 39(C).

Thus, in this case the court did precisely what the litigants agreed that it would do—have the facts determined by the jury and then have the court apply the applicable law to those facts. Moreover, this procedure was employed without affecting any of the parties' substantive rights and without abandoning accepted modes of procedural practice.[8]

Our examination of this assignment of error, however, does not end here. There are two additional points that we must address: first, the waiver of any objection on the part of Stowe-Woodward, and, second, the application of Civ. R. 61.

It is a fundamental precept of appellate procedure that a party must object in a timely fashion to a procedural

error in order to preserve the alleged error upon appeal. See, generally, 4 Ohio Jurisprudence 3d 298, Appellate Review, Section 137. Failure to do so amounts to waiver of that error. In this case, Stowe-Woodward not only failed to object, but it fully embraced the procedure decided upon until nearly three weeks after the fact. At that point the only suitable recourse would have been to grant a mistrial and then to start all over. Because the preservation of judicial economy is precisely the situation sought to be protected by the waiver rule, we agree with Viock's contention that Stowe-Woodward's failure to object acted as a waiver of any alleged error.

We note, in passing, that the Supreme Court of Ohio has recently created an exception to the above rule. In *Reichert v. Ingersoll* (1985), 18 Ohio St. 3d 220, the Court promulgated the "plain error doctrine" for civil cases. The high court explained:

> "Implementation of the plain-error doctrine is to be taken with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. * * * The plain-error doctrine permits correction of judicial proceedings when error is clearly apparent on the face of the record and is prejudicial to the appellant. * * * Although the plain-error doctrine is a principle applied almost exclusively in criminal cases, this court has stated that the doctrine may also be applied in civil causes, even if the party seeking invocation of the doctrine failed to object * * *, if the error complained of 'would have a material adverse affect on the character and public confidence in judicial proceedings.' * * *" *Reichert*, at 223.

We, however, find the doctrine inapplicable for three reasons. First, this is not a case where a party simply

"failed to object" to a trial procedure; the error did not merely slip by inattentive counsel. Rather, Stowe-Woodward clearly supported the procedure, taking time to emphasize that the jury should fully understand its role simply as a fact-finder. Second, we are not prepared to say that the practice of allowing two well-represented parties to determine the best method of peaceably and equitably resolving a conflict would in any way have an "adverse" affect on the character and public confidence of a judicial proceeding while operating under the guidance of a competent court. Third, we cannot find that the procedure led to a manifest miscarriage of justice in any sense of the word. Thus, we find the plain error doctrine inapplicable in this case.

Finally, it is our finding that an application of Civ. R. 61 fully dispenses with any question regarding this assignment of error. Civ. R. 61 provides:

"Rule 61. HARMLESS ERROR.

"No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. *The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.*" (Emphasis added.)

This court is compelled to reject any suggestion of error that has not had an effect on a *substantial right* of Stowe-Woodward's. In this case, the submission of a gen-

eral verdict form would have, no doubt, simply asked the jurors to add the respective figures together to reach a verdict—a simple clerical procedure. Additionally, the trial court, in entering final judgment, specifically noted that the answers to the interrogatories were not in any way inconsistent with one another. See Civ. R. 49(B). Again, we cannot say that any of Stowe-Woodward's rights were in any way impinged upon.

In view of the foregoing facts and analysis, it becomes clear that Stowe-Woodward sought to use a procedure espoused by themselves first, as a sword to protect its interest and, later, when the procedure proved ineffective, to use it as a shield behind which to hide. We are unmoved by this tactic. Appellee-cross-appellant's first cross-assignment of error is hereby found not well-taken

In Stowe-Woodward's second cross-assignment of error, it contends that the interrogatories used in this case were unfairly prejudicial to its cause. Stowe-Woodward argues in support of this contention: (1) that the interrogatories were offered in prejudicial sequence; (2) that the court's failure to instruct the jury on the use of interrogatories produced inconsistent answers thereto; and (3) that the court's failure to submit narrative-formed interrogatories precluded the court from determining the conduct upon which Stowe-Woodward was found liable.

In its first argument, Stowe-Woodward specifically argues that, by counseling the jury to determine a monetary damage amount prior to determining liability, the court forced the jury to presume that Stowe-Woodward would be found liable. In addressing this first argument, we note that *Ragone v. Vitali & Beltrami, Jr., Inc., supra,* explicitly states that the appropriateness and approval of the use of interrogatories reposes in the *discretion* of the

trial court. *Ragone, supra,* paragraph one of the syllabus. Further, in recent years the Supreme Court has been faced with the issue of defining what is an "abuse of discretion," and has, on repeated occasions, held that:

> "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable."

Blakemore v. Blakemore (1983), 5 Ohio St. 3d 217, 219; *Pembaur v. Leis* (1982), 1 Ohio St. 3d 89; *State v. Adams* (1980), 62 Ohio St. 2d 151, 157. See, also, *Chester Township v. Geauga Co. Budget Comm.* (1976), 48 Ohio St. 2d 372.

In view of this definition of the term "abuse of discretion," what becomes immediately apparent is that, in order for a party to prevail on an assertion that a court has abused its discretion, that party must do more than simply show that the trial court has made a mistake in law or judgment. Rather, the party challenging the trial court's ruling on the basis that said court abused its discretion must affirmatively show that the trial court's attitude was unreasonable, arbitrary, or unconscionable.

In this case Stowe-Woodward requested, and was granted, that a comparative negligence charge be given. Additionally, the claim alleged was based on intentional tort. Because liability for either claim can only flow from a finding of damages, it only seems reasonable that before one assess liability between the parties, one should first determine the amount of damages, if any, done to a party. That is exactly what was done here. See *Jerrell v. Woodland Mfg. Co.* (1982), 7 Ohio App. 3d 320. Moreover, we do not find that the determination of the damages suffered by Viock unfairly prejudiced or implicated

Stowe-Woodward as being liable. Even if we would have found that the better practice would have been to determine liability first, we are guided by the Ohio Supreme Court's dicta in *Calderon v. Sharkey* (1982), 70 Ohio St. 2d 218, 222, wherein that court stated:

> "It is important to remember that the question before this court is not whether the trial court ruled as we would have ruled if confronted with these questions, but whether the court abused its discretion so as to prejudice appellee."

While this court may not have ruled as the trial court did, we are not prepared to say that, in ruling as it did, the trial court's attitude was unreasonable, arbitrary, or unconscionable. We, therefore, do not find that the trial court abused its discretion in submitting the interrogatory assessing damages first.

In Stowe-Woodward's second argument within this assignment of error, it contends that the interrogatories pertaining to comparative negligence were inconsistent with the interrogatories pertaining to intentional tort. It further argues that the interrogatories establishing the accrual date of the consortium claims should properly have been separated and determined individually. Here we note two points: first, Stowe-Woodward waived this argument below; and, second, any error that did occur was harmless. Upon closer examination, the record reveals the following discussion between the trial court and counsel for both parties:

> "THE COURT: May I get one point clear, I don't want to go back to the record. These interrogatories were approved by both sides as they went into the Jury Room.

"MR. WOLFE [COUNSEL FOR STOWE-WOODWARD]: Yes, your honor, but not the order in which they were presented to the Jury.

"THE COURT: That doesn't matter, but all interrogatories were agreed upon by both sides, as they went to the Jury Room, not necessarily the order in which they are numbered? * * * Do we have an agreement on that? * * *

"MR. DELLI BOVI [COUNSEL FOR VIOCKS]: Yes.

"MR. WILHELMS [COUNSEL FOR STOWE-WOODWARD]: Your honor I believe on the Statute of Limitations questions, we each submitted our own.

"THE COURT: Well, what I'm saying is this, as I recall we worked out all the details, and these interrogatories were subject to the agreement of both parties and the Court and went into the jury that way.

"MR. WOLFE: Were there any duplicates or variations we * * * were submitted, were the set for the * * * for the * * * that the plaintiff's approved, and a set that the defense approved.

"THE COURT: I don't recall anybody's objection to any specific interrogatory.

"MR. WOLFE: None, Your Honor."

Thus, it is clear that Stowe-Woodward is again objecting to that of which it approved below.

Further, in consideration of our analysis of the Viocks' assignment of error, upon the jury's reaching a conclusion that Carl Viock's injury was intentionally caused by Stowe-Woodward, the interrogatories concerning any negligence

claim then became moot. See discussion, *infra*. Thus, further consideration of any interrogatory concerning a comparative negligence claim is hereby rendered moot and is of no consequence to further consideration of this assignment of error.

In final consideration of Stowe-Woodward's second argument in this assignment of error, because this court is not prepared to recognize a claim for the children's loss of parental consortium, see discussion *infra*, the interrogatory determining the accrual date of the consortium claim can properly be said to apply only to Bernice Viock's consortium claim. Thus, only a single issue has been presented in that interrogatory and Stowe-Woodward's argument is hereby rendered moot.

Finally, in response to Stowe-Woodward's third argument, wherein it argues that narrative-form interrogatories should have been submitted, we pause only long enough to point out that the trial court submitted all interrogatories that Stowe-Woodward had requested. Although some of these interrogatories were later withdrawn by both parties —inasmuch as they were redundant or improperly stated legal or factual questions—Stowe-Woodward at no time presented an interrogatory in a narrative form. Because the court is required only to submit those interrogatories properly prepared by the parties, see Civ. R. 49(B), we can only conclude that the trial court did not err to the prejudice of Stowe-Woodward in not submitting narrative-form interrogatories. Accordingly, we find Stowe-Woodward's entire cross-assignment of error not well-taken.

In the third cross-assignment of error, Stowe-Woodward argues that the trial court's failure to define an intentional tort precisely as "an act committed with the intent to injure another, or committed with the belief that

such injury is substantially certain to occur" constitutes prejudicial error. Stowe-Woodward supports this position by suggesting that the above definition, and *only* a definition using such language, was mandated by the Ohio Supreme Court in the case of *Jones v. VIP Development Co.* (1984), 15 Ohio St. 3d 90. We not only find this argument lacking in substance, we find several compelling reasons to hold the entire cross-assignment of error not well-taken.

As an introductory consideration to the merits of Stowe-Woodward's argument, we emphasize that a jury instruction is not a magical incantation, the slightest deviation from which will render the instructive spell broken. Rather, a jury instruction is a communication, a statement, by the court to the jury, the primary purpose of which is to tell the members of the jury *in language that they can understand,* what they need to know about the issues and the law of a particular case. The necessity to use direct and simple English was emphasized by Justice Mathias in *Bahn v. The Pittsburgh & Lake Erie Railroad Co.* (1966), 6 Ohio St. 2d 192, wherein he stated:

> "A court in considering the propriety of any jury instruction must always bear in mind that the purpose of the jury instruction is to clarify the issues and the jury's position in the case. It must be remembered that juries are composed of ordinary men on the street, not trained grammarians, and that fine distinctions in the meaning of words or phrases are not ordinarily recognized by the average layman. Thus, in considering the propriety of any instruction, the meaning of the words used in the instruction must be thought of in their common meaning to the layman and not what such words mean to the grammarian or the trained legal mind." *Bahn* at 194.

Indeed, as is pointed out in the Ohio Jury Instructions, "[t]he language of legal decisions is not appropriate" for reaching this goal of instructing juries. 1 Ohio Jury Instruction 1.83. The obtuse legalese and confounding abstracts gleaned from previous decisions and case books were never meant to be used by layman [sic]. Such language is the vernacular of a sophisticated professional body and may be confusing to a jury. Jurors however, as ordinary people, are able to understand common phrases, and will accept words at their general, everyday application. Thus, those instructions which are most effective are those which delineate issues and concepts in a concise and simple manner, free of esoteric, judicial definitions and unnecessary refinements. Because unnecessary refinements tend to obscure issues rather than to clarify, it is desirable, if possible, to use the dictionary or a thesaurus to define words rather than law books or law dictionaries. We believe that the effectiveness of jury instructions cannot be measured by a hard and fast rule. Rather, the effectiveness of instructions must be determined by a *complete* review of the facts, the law, and the circumstances surrounding the case; the ultimate test of whether instructions were effective is whether the trial was fair and the result does *substantial justice to both parties*. As a final note, instructions should be viewed in a common sense perspective and not through the "remote and distorting knothole of a distant appellate fence." *Time, Inc. v. Hill* (1967), 385 U.S. 374, 418. Indeed, the poorest instructions are those formalistic recitations of rules and definitions used simply to appease appellate courts. With these considerations in mind, we can compare the point of law at issue with the instruction that was given pertaining to that issue in this case.

In the case *sub judice*, Stowe-Woodward was accused of committing an "intentional tort" against Carl Viock.

The Ohio Supreme Court, in defining an intentional tort, has set forth two elements, either of which will separately sustain the claim, to wit: "[A]n intentional tort is [1] an act committed with the *intent* to injure another, *or* [2] committed with the belief that such injury is *substantially* certain to occur." (Emphasis added.) *Jones, supra,* at 95.

In examining the first separate element of an intentional tort, the Supreme Court noted that "intent" is defined to mean "those consequences which are desired * * *" *Jones, supra,* at 94. Stated another way, intent involves design or purpose, or a willful desire to cause a certain action. See Restatement of Torts 2d, Section 8A. The legal connotation of intent has been broadened however to involve more than such specific intent. In explaining the second separate element of an intentional tort, the Supreme Court explained:

> "[A] specific intent to injure is not an essential element of an intentional tort where the actor proceeds despite a perceived threat of harm to others which is substantially certain, not merely likely, to occur. It is this element of substantial certainty which distinguishes a merely negligent act from intentionally tortious conduct. Where a defendant acts despite his knowledge that the risk is appreciable, his conduct is negligent. Where the risk is great, his actions may be characterized as reckless or wanton, but not intentional. The actor must know or believe that harm is a substantially certain consequence of his act before intent to injury [sic] will be inferred. The existence of this knowledge or intent on the part of the actor may be inferred from his conduct in surrounding circumstances. *Davis v. Tunison* (1959), 168 Ohio St. 471 [7 O.O.2d 296], paragraph two of the syllabus." *Jones, supra,* at 95.

Thus, specific intent to cause an injury is not necessarily required, but proof of either element is quite sufficient to find liability.

We can now examine the language used in the jury instructions to determine if the jury instructions sufficiently conveyed to the jury the legal standards to be applied in this instance. The lower court's instructions on intentional tort reads:

> "Now before the Plaintiff, Carl Viock can recover, he must prove, by a preponderance of the evidence that the injuries he claims to have received by virtue of his employment, were directly caused by the intentional misconduct of the Defendant company as it acted by and through its employees.
>
> "Now as I have defined for you during the trial, an intentional tort occurs when one is intentionally doing that which is wrong, or intentionally failing to do that which should be done. The circumstances must also disclose that the Defendant knew or should have known that such conduct would probably cause injury to the Plaintiff.
>
> "It is a general rule that every person may be presumed to intend the natural and probable consequences of his acts. Wilfull misconduct implies an intentional disregard of a clear duty, or a definite rule of conduct, a purpose not to discharge said duty, or the performance of wrongful acts with knowledge of the likelihood of resulting injury.
>
> "Knowledge of surrounding circumstances and existing conditions is essential. Actual ill will or an intent to injure, need not be present. The acts must be under such surrounding circumstances and existing

conditions that the party doing the act, or failing to act must be aware from his knowledge of such circumstances and conditions that his conduct will probably result in injury.

"Wanton misconduct implies a failure to use any care for the Plaintiff and an indifferance [*sic*] to the consequences when the probability that harm would result from such failure is great. And such probability is known or ought to have been known by the Defendant.

"As I have defined it for you during the trial, an intentional tort occurs when a Plaintiff is injured as a result of a Defendant's intentional misconduct as distinguished from Defendant's negligant [*sic*] conduct.

"Negligance [*sic*] is a failure to use ordinary care. Every person is required to use ordinary care to avoid injuring another person, or himself. Ordinary care is the care that a reasonably prudent person would use under the same or similar circumstances."

Subsequently, the lower court additionally instructed on punitive damages:

"Punitive damages may be awarded only where a party intentionally and with actual malice, injures another without lawful justification or excuse. Actual malice means, anger, hatred. ill will or spirit of revenge, or reckless disregard of the legal rights of others."

It is our initial determination that the trial court emphasized through repetition the importance of the first element of intent. It is our further finding that the definition of an intentional tort as "doing that which is wrong"

and "wilfull misconduct" fully captures the first element of the Supreme Court's standard as set forth in *Jones v. VIP Development, supra.* Indeed, taken at its general and common usage definition, "intentional" is defined as "relating to intention or design: * * * done by design." Webster's Third International Dictionary, unabridged, 1963. This definition clearly parallels the legal definition set out in the Restatement of Torts 2d, *supra,* and that definition as adopted in *Jones v. VIP Development, supra.* Thus, the first element has been properly and fully set forth in the jury instructions.

In defining the second element of an intentional tort, the court instructed the jury that Stowe-Woodward had to have known or should have known that its actions "would probably cause injury" to Viock. The court augmented this statement by saying that Viock must show that Stowe-Woodward knew that the "*probability* that harm would result" was "great." Necessarily a more complex examination must be undertaken to determine whether the language used in this definition sufficiently conveys, in a common-sense manner, the standard of "sufficient certainty." Turning again to common dictionaries, rather than the precise strictures of judicial writing, we note the following definitions as used in common parlance. Webster's Third New International Dictionary defines "probably" as follows:

> "In a fairly convincing way * * * insofar as seems reasonably true, factual, or to be expected * * * Without much doubt: with *practical certainty.*" (Emphasis added.)

This same dictionary defines "probability" as:

> "The quality or state of being probable * * * quite probably: almost certainly."

By way of even further explication, "probable" is defined as:

> "That is based on or arises from adequate fairly convincing though not absolutely conclusive intrinsic or extrinsic evidence or support * * * possible without being undeniably so * * * possible but not with absolute conclusiveness."

Additionally, the American Heritage Dictionary, New College Edition, 1976, defines "probably" as:

> "Most likely; in all probability; presumably."

In turn, Webster's defines "certainty" as:

> "Something that is certain * * * the quality or state of being certain."

"Certain" is said to mean:

> "Fixed, settled, stated * * * inevitable * * * incapable of failing."

Additionally, "substantially" is defined in Webster's as meaning:

> "In a substantial manner: so as to be substantial."

Likewise, "substantial" is defined as meaning:

> "Being that specified to a large degree or in the main."

Thus, from our interpretation of these various definitions, combined with our understanding of the common respective usages of the phrases, we conclude that while something of substantial certainty is to a large degree assured of happening, its occurrence is not *fully* certain. Likewise, if the "probability of something" occurring is "*great,*" it can be said that that occurrence is nearly cer-

tain but not fully certain. Thus, the trial court has used synonymous, yet less esoteric, language to fully define the legal standard of substantially certain conduct. Indeed, the trial court's jury instruction fully captures the high degree of proof necessary to show that an occurrence is substantially certain to happen. The full import of the Supreme Court's definition was clearly conveyed in an understandable fashion without diminishing or straying from the spirit of the Supreme Court's definition. The jury, in turn, was not saddled with trying to decipher or discern meaningless distinctions. While the language used does not include the exact phrase "substantial certainty," as is espoused by Stowe-Woodward, the language is quite sufficient to fulfill the requirements of proper jury instructions.

In addition to this dispositive discussion, there are additionally two other well-founded grounds for finding Stowe-Woodward's cross-assignment of error not well-taken.

First, Stowe-Woodward again failed to properly preserve the alleged error and has, consequently, waived that error. Second, an application of the "two-issue rule" fully supports the jury's findings. We shall consider these two issues separately.

As was previously stated, before an alleged procedural miscue can be reviewed upon appeal, that procedure must be preserved by way of objection. Moreover, if the error alleged is in regard to a jury instruction, it is necessary for the complaining party to offer a correct instruction. *Presley v. Norwood* (1973), 36 Ohio St. 2d 29, paragraph two of the syllabus. Absent both elements, the error is not properly preserved upon appeal and may be considered waived.

In this case, the proposed jury instruction proffered by Stowe-Woodward stated that "the act or lack of action must be directed at causing harm to Carl Viock and it must be done with actual knowledge that harm to Carl Viock would occur * * * Stowe-Woodward must have desired to [injure] Carl Viock or * * * have believed that [injury] was certain." This proposition is clearly contrary to the law as set forth in *Jones v. VIP Development* wherein the Supreme Court stated "We hereby reject the proposition that specific intent to injure is *necessary* to a finding of intentional misconduct." (Emphasis added.) *Jones, supra*, at 95. Although other portions of the same proffered instruction do include accurate statements of prevailing law, it is not prejudicially erroneous to refuse the whole jury instruction even though some parts may be correct. See *Presley v. Norwood* (1973), 36 Ohio St. 2d 29, paragraph two of the syllabus; see, also, 4 Ohio Jurisprudence 2d (Interim Topics) 113 App. Rev. 1045. If the instruction is not complete unto itself, in a form not requiring change or modification, the court is free to reject the instruction in its entirety. Accordingly, this issue may be said to have been waived by Stowe-Woodward by its failure to not only object, but also in its failure to proffer a proper instruction. *Manning v. Len Immke Buick, Inc.* (1971), 28 Ohio App. 2d 203.

As a final consideration to this assignment of error, an application of what has come to be known as the "two-issue rule" fully and separately supports the finding of intentional tort liability, notwithstanding the intentional tort jury instruction. This rule originated in *Sites v. Haverstick* (1873), 23 Ohio St. 626, and was most recently cited with approval in *Gallagher v. Cooper* (1984), 14 Ohio St. 3d 41. The two-issue rule provides:

> "The two-issue rule is, that error in the charge of the court dealing exclusively with one of two or more complete and independent issues required to be presented to a jury in a civil action will be disregarded, if the charge in respect to another independent issue which will support the verdict of the jury is free from prejudicial error, unless it is disclosed by interrogatories or otherwise that the verdict is in fact based upon the issue to which the erroneous instruction related." *Bush v. Harvey Transfer Co.* (1946), 146 Ohio St. 657, paragraph three of the syllabus. *Gallagher* at 42.

In this case, the jury found that Carl Viock was entitled to 2.5 million dollars in punitive damages as a result of Stowe-Woodward's *intentional conduct.* Further, the jury was instructed that punitive damages could only be awarded if they found that Stowe-Woodward had acted *intentionally* and with actual malice to injure Carl Viock without justifiable excuse. Further, the court properly instructed the jury that actual malice includes anger, hatred, ill will or a spirit of revenge. It cannot now be logically argued that the jury could find punitive damages were owing and not find that an intentional tort had taken place. It is also clear from the interrogatories that the jury clearly addressed the issue of defendant's intentional conduct by finding by a preponderance of the evidence that the [sic] Stowe-Woodward's intentional conduct had injured Carl Viock. Accordingly, we conclude that the finding of intentional tort liability may properly be founded upon the conclusions of a second issue, that is, the award of punitive damages based on Stowe-Woodward's intentional misconduct. Accordingly, this analysis fully supports the finding of intentional tort liability against Stowe-Woodward.

Accordingly, for the foregoing reasons, we find Stowe-Woodward's third cross-assignment of error not well-taken.

In Stowe-Woodward's fourth cross-assignment of error, it argues that the manifest weight of the evidence fails to establish that Stowe-Woodward acted with intent to injure Carl Viock or that injury was substantially certain to occur. In examining this argument we note that a decision of the trial court supported by some competent, credible evidence going to all the essential elements of the controversy will not be reversed by a reviewing court as being against the manifest weight of the evidence. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St. 3d 77; *C. E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St. 2d 279. Here, the elements of the controversy include whether Stowe-Woodward acted with either actual or imputed intent to injure Carl Viock. Upon examination of the record, we can only conclude that there is nearly overwhelming evidence presented which, if believed, would support a finding of intentional tortious conduct.

Not only did Viock provide ample evidence that his health condition was work- or chemical-related, but Stowe-Woodward also knew, or should have known, that the chemical and dust levels in the work environment were above acceptable toxicity levels. The following examples provide but a limited review of some of the evidence presented during trial:

—Carl Viock was hospitalized from January 31, 1976, until February 20, 1976, with "chemical pneumonia."

—Carl Viock returned to work at Stowe-Woodward with a work-release slip dated April 12, 1976, indicating that Viock should not be exposed to harmful dust or chemicals in the plant.

—On May 12, 1976, Carl Viock returned to work with a doctor's release slip which read: "Diffuse pulmonary infiltrate, bilateral; probably secondary to chemical pneumonitis."

—Carl Viock testified that upon several occasions he had discussed with the plant manager his work-related lung problems.

—On a daily basis Carl Viock would leave the plant over his lunch break so he could go home and treat his lung condition on an IPPB machine.

—In September of 1976, Carl Viock filed a workman's compensation claim. This claim put the company on notice that Viock had suffered a life-threatening pulmonary injury at the workplace.

—Air samplings collected on March 1, 1978, by governmental agencies established an unacceptably high level of toluene in the area where Viock worked.

Although there is additional conflicting, or exculpatory, testimony, it is not within our province to weigh the credibility of the witnesses or to refute the finding of the lower court under these circumstances. Inasmuch as the foregoing testimony is sufficient to establish actual or an imputed intent to injure Carl Viock, we find Stowe-Woodward's manifest weight argument uncompelling. Accordingly, appellee-cross-appellant's fourth cross-assignment of error is found not well-taken.

In Stowe-Woodward's fifth cross-assignment of error it argues that the trial court erroneously instructed the jury that Stowe-Woodward, as the employer, had a duty to furnish a safe place of employment. Stowe-Woodward further argues that this instruction prejudiced Stowe-Woodward by establishing a negligence standard by which to

measure Stowe-Woodward's conduct, rather than an intentional tort standard. This argument is without merit.

It is fundamental to any negligence tort action that the court instruct the jury on the duty one party owes to another. Once a duty is defined, the court must then delineate what actions constitute a breach of that duty. In an intentional tort case, such as this one, the breach of duty is defined quite differently than in a negligence case.

In its charge to the jury, the trial court stated, in pertinent part:

> "Ordinary care is a relative term. The test though is still ordinary care under the circumstances.
>
> "Not [*sic*] all times, during Plaintiff's employment Defendant had a duty to excercise [*sic*] reasonable care to furnish him with a safe place of employment. To furnish, provide and use safety devices and safeguards and to adopt and use methods and processes reasonably adequate to render Plaintiffs [*sic*] employment and place of employment safe. And to do every other thing reasonably necessary to protect the life, health, safety and welfare of the Plaintiff.
>
> "A safe place of employment is one which is free from recognized hazzard [*sic*] that are causing or likely to cause death or serious physical harm to an employee.
>
> "To determine whether Defendant maintained a safe place of employment, you must consider all the facts and circumstances involved. The duty to maintain a safe place of employment only requires an employer to excercise [*sic*] reasonable and ordinary care. Having due regard to the hazzard [*sic*] of the place of employment. The employer is not required to insure or guarantee that the place of employment is in fact. safe."

Later, in delineating the difference between a negligence action and an intentional tort action, the court specifically noted, "As I have defined it for you during the trial, an intentional tort occurs when a Plaintiff is injured as the result of a Defendant's intentional misconduct as distinguished from Defendant's negligant [*sic*] conduct." Thus, it becomes clear that the court had taken pains to clarify the issues as to giving proper instructions to the jury and delineating the proper standards to be applied. Accordingly, we find Stowe-Woodward's fifth cross-assignment of error not well-taken.

In the sixth cross-assignment of error, Stowe-Woodward raises for the first time in this case the issue of battery and the defense of a consent to a battery. Because this issue has not been raised below, this court need not address the alleged error now. See *Motes v. Metropolitan Bank of Lima* (1974), 40 Ohio St. 2d 47; see, also, App. R. 12(A). Accordingly, appellee-cross-appellant's sixth cross-assignment of error is hereby found not well-taken.

In the seventh cross-assignment of error, Stowe-Woodward again challenges the statute of limitations to be applied in this case and further argues that the manifest weight of the evidence established that Carl Viock did not file his claim within the statutory limits.

In *Stowe-Woodward v. Viock* (1983), 13 Ohio App. 3d 7, [hereinafter referred to as *Viock I*], this court carefully considered the appropriate statute of limitations to be applied in cases seeking to recover damages for bodily injury similar to the case *sub judice*. We specifically held therein that the statutory provisions of R.C. 2305.10, which establishes that a claim shall be brought within *two years* after the cause arose, shall apply. Inasmuch as *Viock I* was exhaustively researched and well-reasoned, we stand by that decision.

In examining Stowe-Woodward's manifest weight argument, we also turn to *Viock I.* Therein, it was established that the statute of limitations applicable to Viock's claim in this case began to run when Viock knew or should have known that: (1) he had been injured, and (2) that his injuries were proximately caused by Stowe-Woodward's conduct. See *Viock I, supra,* at 12. Thus, our inquiry is now whether there was competent, credible evidence which, if believed, would establish that Carl Viock had filed his claim within two years after having discovered his injury. In further examining this issue, we note that when, as here, the injury is caused by continuous or repeated acts, the statute of limitations does not begin to run until the tortious conduct ceases. This rationale is well-based on the theory that one should not be allowed to acquire a right to continue certain tortious conduct merely by the tolling of the statutory time limit. See *Viock I, supra.* In essence, an employee's right of action against his employer for personal injuries is tolled until the last day the employee was subjected to the conditions causing the injury. In this case Carl Viock was subjected to dangerous chemical exposure until June 1, 1981, the day on which his employment was terminated. This lawsuit was filed on February 5, 1982. Accordingly, we find that Carl Viock has filed his claim well within the two-year statute of limitations as discussed in *Viock I.* Accordingly, we find this cross-assignment of error not well-taken.

In the eighth cross-assignment of error, Stowe-Woodward argues that a cause of action for loss of parental consortium is not recognized by Ohio law and that the award of damages under such a claim is erroneous. Stowe-Woodward further argues that if such a claim does exist, in this case it would be properly barred by the statute of limitations.

In *Kane v. Quigley* (1964), 1 Ohio St. 2d 1, the Ohio Supreme Court expressly ruled that a child has no cause of action against a third party for loss of a parent's affection, companionship, and guidance. *Kane, supra*, at paragraph one of the syllabus. Yet it is upon substantially similar criteria that the trial court in this case awarded each of Viock's four dependent children $20,000 apiece. In light of the Supreme Court's holding in *Kane,* such an award was erroneously and prejudicially granted. Thus we find Stowe-Woodward's argument well-taken. Further, because the claim of loss of parental consortium does not exist in relationship to this case, further consideration of the statute of limitations arguments is hereby rendered moot. Appellant's eighth cross-assignment of error is found well-taken.

In the ninth cross-assignment of error, Stowe-Woodward argues that the trial court erred in entering judgment for Bernice Viock because the four-year statute of limitations had fully run.[8] Stowe-Woodward bases this argument on answers given by the jury to certain interrogatories, to wit: In interrogatory No. 14, the jury found that Bernice Viock first sustained a *temporary* loss of consortium on June 31, [sic] 1976. Because this temporary loss was more than four years prior to the filing of the instant action, Stowe-Woodward alleges that the claim should be barred.

In further examining this issue, we note that the jury also found in interrogatory No. 15 that Bernice Viock did not begin sustaining *permanent* loss of consortium until June 5, 1981. Moreover, as the court noted in *Viock I, supra,* when examining R.C. 2305.09(D):

> "We do not believe that the legislature intended that the statute be applied in a manner which would re-

> quire one to file an action for temporary sickness [and] discomfort or risk the loss of a right of action for permanent injury." *Viock, supra,* at 12.

Thus, inasmuch as this claim was filed on February 5, 1982, and inasmuch as Bernice Viock did not sustain permanent loss of consortium until June 1, [sic] 1981, we find that her claim was filed well within the four-year statute of limitations and is applicable in this case.

Additionally, we pause to point out two further considerations. First, we have determined that no cause of action exists as to the children's claim for loss of parental consortium. Second, it is well within the province of the trial court to reconcile all answers and interrogatories as being consistent if possible. See Civ. R. 49(B). Thus, it becomes clear that interrogatories 14 and 15 can be reconciled as applying only to causes of action pertaining to Bernice Viock, and not to the children's claims. Accordingly, these interrogatories can be said to address only one issue. In light of the foregoing, we find Stowe-Woodward's ninth cross-assignment of error not well-taken.

In the tenth cross-assignment of error, Stowe-Woodward argues, in essence, that there is insufficient evidence of actual malice, hatred, or ill will upon which to base an award of punitive damages. See *Detling v. Chockley* (1982), 70 Ohio St. 2d 134, *superseded by statute on other grounds,* see *State v. Hennessee* (1984), 13 Ohio App. 3d 436.

In *Detling,* the court summarized the standard of proof for punitive damages as follows:

> "Evidence of actual malice, therefore, must be present before a jury question of punitive damages is raised; actual malice may take either the form of the defen-

> dant's express ill will, hatred or spirit of revenge, or the form of reckless, willful or wanton behavior which can be inferred from surrounding circumstances. In either case, the defendant's actions must have been 'intentional and deliberate, or * * * [have] the character of outrage frequently associated with crime.'" *Detling* at 138.

As this court has previously explained, "upon the question of punitive or exemplary damages, the courts recognize that such damages may be awarded if the negligence of the defendant is so gross as to show a reckless indifference to the rights and safety of other persons and to raise the presumption of conscious indifference to consequence." *Richard v. Office Products Co.* (1977), 55 Ohio App. 2d 143, 146-147.

In the case *sub judice,* the jury expressly found that Stowe-Woodward's conduct had intentionally injured Carl Viock. This finding is augmented and supported by the evidence tending to show that Stowe-Woodward was aware of the dangers posed to Carl Viock by the chemical, yet refused to amend or rectify its practices. Stowe-Woodward's dilatory actions, even after Viock had fallen ill and was discharged, provide ample competent, credible evidence from which a jury could infer or presume intentional conduct or conscious indifference to consequences. See *Seasons Coal Co., supra.* Accordingly, we find Stowe-Woodward's tenth cross-assignment of error not well-taken.

Finally, Stowe-Woodward argues that the trial court erred in entering judgment for past and future lost wages when such losses cannot be recovered in an intentional tort case of this sort. We disagree.

As was pointed out in *Jones v. V.I.P., supra,* at 99, "[a]llowing a worker to receive workers' compensation

benefits in conjunction with common law damages in no way constitutes a double recovery." Stated another way, "the receipt of workers' compensation benefits does not preclude an employee or his representative from pursuing a common-law action for damages against his employer for an intentional tort." *Jones, supra,* at paragraph two of the syllabus. Thus, inasmuch as lost wages, past and future, can be used to determine damages flowing from a tort, the consideration of such damages was entirely proper in this case. Accordingly, Stowe-Woodward's eleventh cross-assignment of error is hereby found not well-taken.

In the Viocks' (appellants hereinafter) sole assignment of error they argue, in essence, that, because this case arose as a result of an alleged intentional tort, the trial court erred in instructing the jury on comparative negligence. Conversely, Stowe-Woodward (appellee hereinafter) suggests that Carl Viock voluntarily assumed any risk associated with his particular task by returning to work as a roll-coverer; because Viock had been informed by a physician that the chemicals and dust to which he was exposed would cause him injury, Stowe-Woodward contends that his compensatory recovery should be barred.

In addressing these initial issues raised by Viock and Stowe-Woodward, we note that "intent" is a critical prerequisite to any tort recovery in this case, given the Ohio Supreme Court's ruling in *Blankenship v. Cincinnati Milacron Chemicals* (1982), 69 Ohio St. 2d 608, certiorari denied (1982), 459 U.S. 857. See, also, *Jones v. VIP Development Co., supra.* In *Jones,* the court succinctly pointed out that "where the injury suffered at the workplace is not *intentionally* inflicted the employee's *sole avenue of recovery* is through the workers' compensation system." (Emphasis added.) *Jones,* at 94. Thus, the doctrines of

assumption of the risk and comparative negligence have absolutely no bearing whatsoever in determining a percentage or partial allocation of a compensatory damage award in the case *sub judice*. Stated another way, if an employer-defendant intentionally injures an employee-plaintiff, that plaintiff is entitled to whatever damages will make him whole. Conversely, if an employee-plaintiff is injured on the job, but not by the intentional misconduct of the employer-defendant, the plaintiff can only recover through workers' compensation benefits. Accordingly, the sole issue remaining under this assignment of error is whether an application of either doctrine could be applied as a possible affirmative defense to a claim of intentional tort.

In examining Stowe-Woodward's assumption of the risk argument, we note that in 1967 the Supreme Court of Ohio held, in the case of *Wever v. Hicks* (1967), 11 Ohio St. 2d 230, that:

> "1. The defense of assumption of the risk is available to a defendant where a plaintiff consents to or acquiesces in an appreciated, known or obvious risk to the safety of the plaintiff, even where willful and wanton misconduct on the part of the defendant may be proved." *Wever, supra,* at paragraph one of the syllabus.

However, in 1983 the Supreme Court merged the doctrine of assumption of the risk with contributory negligence in *Anderson v. Ceccardi* (1983), 6 Ohio St. 3d 110, for purposes of apportionment of fault under R.C. 2315.19, the comparative negligence statute. See *Ceccardi, supra,* at 111. Thus, assumption of the risk is no longer a complete bar to recovery under the comparative negligence statute. With this in mind, we are left to consider whether a com-

parative negligence instruction is proper in an intentional tort case.

Because there is no precedent in Ohio addressing this issue, we are guided in our decision by the persuasive and well-reasoned authority of scholars and jurisdictions that have considered substantially similar issues. At the outset we note that, as a general premise, where a defendant's conduct is actually intended to inflict harm upon the plaintiff, the defense of *contributory* negligence has never been extended to such intentional torts. Prosser, Law of Torts, at 426 (4th Ed. 1971). See, also, V. Schwartz, *Comparative Negligence,* Section 5.2 (1974). Schwartz goes on to state that "[u]nder *comparative* negligence, the result is likely to be the same [as under contributory negligence] and defendant[s] will be unable to use plaintiff's negligence to diminish the award." (Emphasis added.) Schwartz, *supra,* p. 101.

Additionally, several courts throughout the nation have considered whether comparative negligence should act as a defense in intentional tort actions. For example, the Michigan Court of Appeals in the case of *Melendres v. Soales* (1981), 306 N.W. 2d 399,[9] while discussing an intentional tort, stated:

> "Where defendant intentionally commits a tort, comparative negligence is no defense which can serve to reduce his potential liability. The reason is clear from the very name of the comparative negligence doctrine. *In such circumstances, defendant has simply not been negligent. There are no degrees of negligence to compare.* A person's obligation to guard him-

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9. Michigan established its comparative negligence doctrine in the case of *Placek v. City of Sterling Heights* (1979), 275 N.W. 2d 511.

self from injury caused by design is insignificant, if existent at all, compared to his obligation to guard himself from injury caused by another's simple lack of care." (Emphasis added.) At 403.

This same, or similar, reasoning is found throughout the jurisdictions with comparative negligence statutes. The Wyoming Supreme Court, in *Danculovich v. Brown* (1979), 593 P. 2d 187, in construing their comparative negligence statute stated:[10]

"§1-1-109 does not mandate reduction of damages on the basis of comparative negligence of the plaintiff if defendant's misconduct is willful and wanton * * * Damages resulting from willful and wanton misconduct are not 'damages for negligence' as that term is used in §1-1-109." *Brown* at 194 (dissenting Opinion).

In a similar case, the Idaho Supreme Court, in *Masters v. State of Idaho* (Idaho 1983), 668 P. 2d 73, stated that a comparative negligence apportionment:

"* * * does not concern the difference in the kind of conduct which distinguishes negligence from willful and wanton misconduct. Willful and wanton misconduct, in the strict sense, is not negligence, since it involves intent rather than inadvertence, and is positive rather than negative." *Masters* at 81.

The Tenth Circuit, in mentioning the foregoing case, stated in *Bell v. Mickelsen* (1983), 710 F. 2d 611, at p. 617:

"We believe that the [the Wyoming Supreme Court's] analysis and distinction is equally applicable in a case involving damages for the intentional tort of outrageous conduct. Accordingly, we hold that the trial court

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10. See Wyoming Stat. Ann. 1957, Sec. 1-1-109.

erred in reducing damages on the basis of * * * comparative negligence."

In a Colorado case, *Carman v. Heber* (1979), 601 P. 2d 646, the court stated simply that a "finding of intentional wrongdoing on the part of the defendant renders the comparative negligence statute inapplicable."

Two states that have derived their comparative negligence doctrines from case law, rather than statutory construction, have reached similar conclusions. The California Court of Appeals held that comparative negligence[11] is not applicable in an intentional tort. *Munoz v. Olin* (1977), 142 Cal. Rptr. 667. Likewise, Florida held that comparative negligence[12] is not a defense to intentional tort. *Honeywell, Inc. v. Trend Coin Co.* (1984), 449 S. 2d 877, 879.

Based upon the weight of the foregoing analysis, it is our conclusion that neither comparative negligence nor, by implication, assumption of the risk, can serve as a defense to an intentional tort. Thus, where an intentional tort instruction is presented to a jury in an employee injury case, a comparative negligence instruction has no relevance; its application is wholly misplaced as a defense and is particularly misplaced as a vehicle for reducing a damage award. Not only was the issue of Viock's alleged comparative negligence wrongfully submitted to the jury, the court erred in reducing this award. We, therefore, acting in accordance with App. R. 12(B), reinstate the full damage award entered for Carl and Bernice Viock; inasmuch as damages were wrongfully awarded to the children at

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11. See *Li v. Yellow Cab Co. of California* (1975), 532 P. 2d 1226.

12. See *Hoffman v. Jones* (1973), 280 S. 2d 431.

all, and have been removed, this holding has no bearing on that award.

In conclusion, having found appellants-cross-appellees' sole assignment of error well-taken, appellee-cross-appellant's eighth cross-assignment of error well-taken, and the remaining cross-assignments of error not well-taken, we hereby affirm, in part, and reverse, in part, the decision of the Erie County Court of Common Pleas. Moreover, pursuant to App. R. 12(B), because judgment was erroneously entered for the Viock children, that award shall not be made a part of the final judgment. Additionally, because the trial court erroneously reduced the awards granted to Carl and Bernice Viock pursuant to a comparative negligence finding, those awards shall be reinstated at their original amounts of $750,000 and $400,000, respectively. The award for punitive damages is unaffected. Cause remanded to the trial court for execution of judgment not inconsistent with this decision and for assessment of costs. Costs to be divided equally between the parties.

JUDGMENT AFFIRMED, IN PART, AND REVERSED, IN PART.

Wilkowski, *J.*, concurs; Resnick, *J.*, concurs, in part, and dissents, in part.

RESNICK, *J.*, concurring in part and dissenting in part. Inasmuch as I wrote the original decision in which, at the time, no one fully concurred, I do concur in the majority's adoption of that portion of my opinion as to appellants-cross-appellees' sole assignment of error wherein it is contended that it was error for the trial court to instruct the jury as to comparative negligence in an intentional tort case.

I am, however, compelled to adamantly dissent from everything else which is contained in the foregoing majority decision. After a cursory reading of the decision, I am reminded of the adage that when the law is not with you, then stress the facts. I have great sympathy for Mr. Viock and I would, if possible under the law, want to affirm his case. However, the entire trial was filled with such error and tried contrary to the existing law of the state of Ohio that this case must be reversed and remanded for a new trial.

It becomes readily apparent from a reading of the "majority" decision that they decided to affirm the case and then proceeded to justify this result in thirty-five pages filled with the facts embellished by platitudes and irrelevant citing of inappropriate and inapplicable case law.

Turning now to a consideration of appellee-cross-appellant's first assignment of error wherein it is contended that it was error for the trial court not to require the jury to return a general verdict. In essence, the trial court had the jury return a special verdict.

Civ. R. 49(C) provides that:

"Special verdicts shall not be used."

The majority holds that since no one objected to this procedure the error was waived. Additionally, the majority concludes when addressing the mandatory language of the foregoing rule "that the use of a general verdict form is a procedural device, inasmuch as it does not determine any substantive rights of the parties; rather, it is a device used to manage litigation. Accordingly, we conclude that 'shall' need not be applied in a compulsory manner at all times." Appallingly, the majority fails to cite any authority for such a holding.

Civ. R. 49(C) is clear. Special verdicts are prohibited in Ohio and general verdicts are mandatory without exception. Any other procedure under Ohio law cannot be approved. If we were to follow the majority's reasoning to its logical conclusion, then trial judges and attorneys could agree to any stipulated procedure, even though totally contrary to Ohio law, rules or procedures. As long as all consent, the majority maintains "we are loathe to allow justice to become a slave to grammar." *Ipso facto,* all procedural rules may be disregarded if there is consent or no objection. This is ludicrous.

The majority cites *Reichert v. Ingersoll* (1985), 18 Ohio St. 3d 220, and states that the plain error doctrine does not apply in the case *sub judice* in that the parties were represented by competent counsel who should be allowed to determine "the best method of peaceably and equitably resolving a conflict." Furthermore, the majority states that they "cannot find that the procedure led to a manifest miscarriage of justice." Yet, Ohio Civ. R. 49(C) abolishes the special verdict, and Civ. R. 49(A) states that the general verdict "*shall* be used." From this mandatory language, it is impossible to apprehend how the litigants and the court can agree to use a jury in merely an advisory capacity and permit the court to enter a final verdict. There is nothing which can have more of "a material adverse affect on the character and public confidence in judicial proceedings" then for a court to advise the jury that:

> "You were told that *you were not gonna return a verdict,* you're gonna answer a bunch of questions, and you have not returned a verdict." (Emphasis added.)

The cornerstone of the jury system is to render a final verdict when the case is tried to a jury. It is not the

function of the court in a jury trial to render a final verdict. Civ. R. 49 mandates that a jury return a *general verdict.*

Even if this error could be overlooked, the instruction as to an intentional tort given by the court mandates reversal.

The Supreme Court of Ohio, in its latest opinion, defined an intentional tort and set forth that which is required under present law by way of jury instruction in the case of *Jones v. VIP Development Co.* (1984), 15 Ohio St. 3d 90. Justice Brown, writing for the majority, stated:

> "* * * an intentional tort is an act committed with the intent to injure another, or committed with the belief that such injury is *substantially certain to occur.*" (Emphasis added.) *Id.* at 95.

The Supreme Court then stated:

> "Thus, a specific intent to injure is not an essential element of an intentional tort where the actor proceeds despite a perceived threat of harm to others which is *substantially certain*, not merely likely, to occur. It is this element of *substantial certainty which distinguishes a merely negligent act from intentionally tortious conduct.* Where a defendant acts despite his knowledge that the risk is appreciable, his conduct is negligent. Where the risk is great, *his actions may be characterized as reckless or wanton, but not intentional.* The actor must know or believe that harm is a substantially certain consequence of his act before intent to injury [sic] will be inferred." (Emphasis added.) *Id.* at 95.

From the foregoing it is readily apparent that a jury must be instructed that the actor proceeds despite a per-

ceived threat of harm which is not just "likely to" or "probably will" occur, *but* which is *substantially certain* to occur. It is this degree of foreseeability that renders the tort *intentional* rather than merely *negligent, reckless* or *wanton misconduct.*

The Fifth Circuit in *Keating v. Shell Chemical Co.* (1980), 610 F. 2d 328, 332, while discussing what is required in pleadings to allege an intentional tort succinctly stated:

> "On the other hand, the mere knowledge and appreciation of a risk, short of substantial certainty, is not the equivalent of intent. The defendant who acts in the belief or consciousness that he is causing an appreciable risk of harm to another may be negligent, and if the risk is great his conduct may be characterized as *reckless* or *wanton, but it is not classed as an intentional wrong.* In such cases the distinction between intent and negligence obviously is a matter of degree. Apparently the line has been drawn by the courts at the point where the known danger ceases to be only a foreseeable risk which a reasonable man would avoid, and becomes a substantial certainty." (Emphasis added.)

It is apparent that the distinction is in fact a matter of degree but *obviously* of the utmost importance. A jury misdirected on this crucial issue could understandably find what amounts to reckless or wanton misconduct as an intentional tort.

The majority holds that "a jury instruction is not a magical incantation, the slightest deviation from which will render the instructive spell broken." It is beyond comprehension that the use of the term "would probably cause" is a slight deviation from "substantial certainty to occur."

There is a great difference between a *probability* and a *substantial certainty*. The words *are not* synonymous. This becomes readily apparent after a review of the majority's definitions of the foregoing words. By the majority's own words "substantial" means to a large degree. "Certainty" has been defined as *inevitable*. On the other hand, "probably" means *likely* or *presumably*. There is as much difference between the meanings of substantial certainty and probably as there is between preponderance of the evidence and beyond a reasonable doubt.

The instruction by the court undermined the standard mandated by the Supreme Court of Ohio. The jury was instructed that the "circumstances must also disclose that the Defendant *knew* or should have known that such conduct would "probably" cause injury to the plaintiff." They were not told that they must find that the defendant employer "proceeds despite a perceived threat of harm to others which is *substantially certain*, not merely likely, to occur. " *VIP, supra*, at 95.

When comparing these two instructions we cannot again help but think of them in light of the difference between what proof is required when a jury is instructed regarding finding proof by a preponderance of the evidence, as opposed to proof beyond a reasonable doubt. The instruction which the trial court gave in the case *sub judice* caused the jury to be totally misdirected. Therefore, any finding of the jury is inevitably unreliable.

The majority's holding that the two-issue rule as set forth in *Gallagher v. Cooper* (1984), 14 Ohio St. 3d 41, applies in this case is totally erroneous. The *Gallagher* case talks of error in a charge which deals exclusively with one of two or more *complete and independent issues*. The issue of punitive damages is not complete and independent

of the issue of an intentional tort. The case *sub judice* presented one major issue to the jury, that being the question of whether an intentional tort had been committed. An intentional tort was never correctly defined. The majority's reasoning that a finding of punitive damages somehow attempts to correct the error committed by the incorrect charge as to an intentional tort is wholly without merit. The jury was incorrectly instructed as to the definition of an intentional tort and we must, therefore, not place any credence in their verdict.

The majority then contends that this error somehow was not properly preserved and must be considered waived. It is incomprehensible how this could be the case in view of the fact that a proposed jury instruction was prepared which, in essence, called for a finding of "substantial certainty." Nevertheless, assuming arguendo, that the majority was partially correct, this error cannot be waived. Truly this is the type of error that the Supreme Court of Ohio had in mind when it applied the plain error doctrine to civil cases. *Reichert v. Ingersoll, supra,* at 223, stated:

> "The plain-error doctrine permits correction of judicial proceedings when error is clearly apparent on the face of the record and is prejudicial to the appellant. *State v. Eiding* (1978), 57 Ohio App. 2d 111 [11 O.O. 3d 113]. Although the plain-error doctrine is a principle applied almost exclusively in criminal cases, this court has stated that the doctrine may also be applied in civil causes, even if the party seeking invocation of the doctrine failed to object to the jury instruction in question, if the error complained of 'would have a material adverse affect on the character and public confidence in judicial proceedings.' *Schade*

v. Carnegie Body Co. (1982), 70 Ohio St. 2d 207, 209 [24 O.O. 3d 316]. See, also, *Yunkwoirth v. McAvoy* (1972), 32 Ohio St. 2d 285, 288 [61 O.O. 2d 504]."

Given an erroneous definition as to the meaning of an intentional tort it is not only "prejudicial to the appellant" but it has "a material adverse affect on the character and public confidence in judicial proceedings." It is an error that cannot be considered waived or harmless and, therefore, it must not be overlooked.

This error requires reversal and remand for a new trial with a jury correctly instructed as to the meaning of an intentional tort.

The only other assignment of error which requires comment is appellee-cross-appellant's No. 11 wherein it is contended that the court erred in entering judgment for past and future lost wages. In determining damages in a case involving an intentional tort it is absolutely necessary to consider evidence as to lost wages both past and future. Since plaintiff in an intentional tort case is not precluded from recovering workers' compensation, the court, after accepting a plaintiff's verdict, must set off the amount of the workers' compensation award from the jury's verdict in order to avoid double recovery.

For all of the foregoing reasons, I would reverse and remand for a new trial.

APPENDIX A

IN THE COMMON PLEAS COURT OF
ERIE COUNTY, OHIO

Case No. 44358

CARL W. VIOCK, *et al.*,
Plaintiffs,

vs.

STOWE-WOODWARD COMPANY,
Defendant.

INTERROGATORY NO. 1

What is the total monetary amount which will fairly compensate plaintiff, Carl Viock for his present condition?

State the amount in dollars. $750,000.00

*In making this determination, you will disregard the conduct of any party, you will not consider punitive damages, and you will disregard any income Carl Viock may have from Workers' Compensation, welfare, or otherwise.

INTERROGATORY NO. 2

Do you find by a preponderance of the evidence that Stowe-Woodward Company's intentional conduct injured Carl Viock?

Answer "yes" or "no" Yes

INTERROGATORY NO. 3

Do you find by a preponderance of the evidence that Carl Viock acted in disregard of his own safety which proximately caused in whole or in part, his present condition?

Answer "yes" or "no" No

INTERROGATORY NO. 4

What is the percentage of responsibility of each party which directly and proximately caused Carl Viock's present condition?

20% Percentage of Plaintiff's responsibility, if any.

80% Percentage of Defendant's responsibility, if any.

100% TOTAL

*If you find by a preponderance of the evidence that the conduct of any party was not a direct and proximate cause of the plaintiff's present condition, then you will show that party's percentage as zero.

INTERROGATORY NO. 5

What is the total monetary amount, if any, which will fairly compensate Bernice Viock for loss of consortium?

State the amount in dollars. $400,000.00

*In making this determination, you will disregard the conduct of any party, and any income Carl Viock may have from Workers' Compensation, welfare, or otherwise.

INTERROGATORY NO. 6

What is the monetary amount, if any, which will compensate each of the children of Carl Viock for loss of consortium?

State the amount in dollars.

*In making this determination, you will disregard the conduct of any party, and any income Carl Viock may have from Workers' Compensation, welfare, or otherwise.

$25,000.00 Donna M. Viock

$25,000.00 Michael A. Viock

$25,000.00 Gena A. Viock

$25,000.00 Gloria L. Viock

INTERROGATORY NO. 7

If you find that Stowe-Woodward Company's intentional conduct injured Carl Viock, what punitive damages, if any, do you award the Plaintiff?

State the amount in dollars. $2.5 million

INTERROGATORY NO. 8

When did Carl Viock first know or should have known that the environment of the workplace was injuring him?

Insert date 8-12-80

INTERROGATORY NO. 9

When did Carl Viock first know or should have known that the environment of the workplace was causing him serious permanent injury?

Insert date. 10-16-80

INTERROGATORY NO. 10

When did Carl Viock first know or should have known that his present condition was caused by the intentional conduct of Stowe-Woodward Company?

Insert date. Feb 1982

INTERROGATORY NO. 11

When did Carl Viock first know or should have known that the intentional conduct of Stowe-Woodward Company was injuring him?

Insert date. Feb 1982

INTERROGATORY NO. 12

Did Carl Viock voluntarily and unreasonably expose himself to a known risk of serious permanent injury, upon or following his return to work at Stowe-Woodward Company in 1976?

Answer "yes" or "no". No

INTERROGATORY NO. 13

Did Carl Viock, with knowledge of the dangers he personally faced from additional exposure to the dust and chemicals at Stowe-Woodward Company, voluntarily go back to work?

Answer "yes" or "no". Yes

INTERROGATORY NO. 14

When did Bernice Viock and the Viock children begin sustaining a loss of the society, services, companionship, comfort, love and solace of Carl Viock, if any?

Insert date. 1-31-76

INTERROGATORY NO. 15

When did Bernice Viock and the Viock children begin sustaining a permanent loss of the society, services, companionship, comfort, love and solace of Carl Viock, if any?

Insert date. 6-5-81

ENTRY OF THE OHIO SUPREME COURT GRANTING MOTION TO CERTIFY IN WHISLER v. DALLAS & MAVIS FORWARDING COMPANY, INC.

(Dated January 15, 1986)

Case No. 85-1808

THE SUPREME COURT OF OHIO

COLUMBUS

RITA S. FUCHSMAN, Admx., Estate of Roy W. Whisler,
Appellee,

v.

DALLAS & MARVIS [sic] FORWARDING CO., INC.,
Appellant.

ENTRY

Upon consideration of the motion for an order directing the Court of Appeals for Ross County to certify its record it is ordered by the Court that said motion is allowed.

/s/ FRANK D. CELEBREZZE
Chief Justice

DECISION AND JUDGMENT ENTRY OF THE COURT OF APPEALS OF ROSS COUNTY, OHIO IN WHISLER v. DALLAS & MAVIS FORWARDING CO., INC.

(Dated September 27, 1985)

No. 1124

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

RITA S. FUCHSMAN, ADMINISTRATRIX OF THE ESTATE OF ROY W. WHISLER, DECEASED,
Plaintiff-Appellant,

vs.

DALLAS & MAVIS FORWARDING CO., INC.,
Defendant-Appellee.

DECISION AND JUDGMENT ENTRY

APPEARANCES:

MESSRS. HIRSCH, STANHOPE & PRESTON; MR. MARK A. PRESTON, Chillicothe, Ohio, for *Appellant.*

MESSRS. KNEPPER, WHITE, ARTER & HADDEN, Columbus, Ohio, for *Appellee.*

STEPHENSON, *P.J.*,

This is an appeal from a judgment entered by the Court of Common Pleas of Ross County, Ohio, granting to Dallas & Mavis Forwarding Company, Inc., defendant below and appellee herein, its motion for a directed verdict on the intentional tort claim of Rita S. Fuchsman, Administra-

trix of the Estate of Roy W. Whisler, deceased, plaintiff below and appellant herein.

Appellant assigns the following errors:

ASSIGNMENT OF ERROR #1:

The trial Court erred, to the prejudice of Appellant, in holding that reports and written memorandum prepared by Appellee's Corporate Safety Director were not subject to discovery by Appellant.

ASSIGNMENT OF ERROR #2:

The trial Court erred in granting Appellee's Motion for a Directed Verdict on the basis that Appellant's cause of action was barred by an application for, and receipt of, Workers' Compensation benefits on behalf of the surviving spouse and minor children of Appellant's decedent, on the theory of 'election of remedies.'

ASSIGNMENT OF ERROR #3:

The trial Court erred in granting Appellee's Motion for a Directed Verdict on the basis that there was insufficient evidence to support a finding that Appellee had committed an intentional tort.

ASSIGNMENT OF ERROR #4:

The trial Court erred, to the prejudice of Appellant, in ruling that evidence of an application for, and receipt of, Workers' Compensation benefits is admissible."

On August 13, 1982, Carolyn A. Whisler, wife of the decedent, Ray Wayne Whisler, and then administratrix of his estate, filed a complaint in her fiduciary capacity

which averred, inter alia, that appellant's decedent was killed as a result of appellee "forcing its employees to transport gliders[1] without positive braking devices and employing a towing apparatus which did not include a positive braking device." The complaint further averred that appellee knew or should have known that the movement of gliders in this fashion could be harmful to its employees and in violation of industrial and government regulations, and the conduct of appellee was intentional. The complaint prayed for $600,000.00 in compensatory damages and $500,000.00 in punitive damages. On September 27, 1982, appellee filed an answer denying the substance of the charge of appellant's complaint.

On April 29, 1983, appellee filed an amended answer to the complaint. On October 27, 1983, appellant, who had become administratrix of the estate of the decedent, Roy W. Whisler, filed an amended complaint. On October 31, 1983, appellant filed a motion to compel discovery of, inter alia, any and all documents in the possession of appellee relating to the incident involving appellant's decedent. Appellee claimed that such documents were entitled either to the work product or attorney-client privilege. On February 6, 1984, the trial court denied appellant's motion to compel discovery. On February 13 and 14, 1984, the case proceeded to jury trial at which the following evidence was adduced. On August 18, 1981, Roy W. Whisler and another employee of appellee, Roy Keown, decided to tow in a dual glider system that had been placed outside the shop after assembly in order to join it to a power unit inside the shop. They placed an approximately twenty foot metal chain on the back of

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1. A glider, as the term is used here, refers to a semi-tractor that does not have certain component parts. A dual glider assembly is comprised of two gliders bolted together.

a pickup truck and attached it to the dual glider assembly. Roy Keown drove the truck into the shop and Roy Whisler stood in the dual glider assembly in order to steer it. The dual glider assembly was not equipped with brakes. Roy Keown was going to get out of the truck to throw a block under one of the wheels of the dual glider assembly in order to stop the assembly once it got into the shop. This procedure was necessitated by the fact that the floor of the shop had a slight incline towards a drain located in the center of the shop.

As Roy Keown opened the door to get out of the truck, he felt a bump and saw appellant's decedent in a sitting position between the truck and the dual glider assembly. Appellant's decedent died soon thereafter. The usual procedure employed by the Chillicothe Terminal employees of appellee in towing dual glider assemblies into the shop to hook them to power units was to utilize three employees, one to drive the truck, one to steer the glider assembly, and one to throw a block under the glider assembly once it was positioned inside the shop. Roy Keown and appellant's decedent had decided to go ahead and use only two employees when other employees had not arrived on time. Appellee's Chillicothe Terminal Manager, Don Schuettenberg, testified that he knew that the three man procedure for towing dual glider assemblies had been utilized before. Appellee's Safety Director, Rolf Katzenstein, testified by deposition read into the record at trial, that the procedure used for towing dual glider assemblies in the Chillicothe Terminal was hazardous and that Don Schuettenberg was responsible for implementing corporate safety on a terminal level. At the end of appellant's case, appellee moved for a directed verdict on two grounds, that the evidence disclosed the decedent's survivors had applied for and received workers compensa-

tion benefits for appellant's decedent's death and this constituted an election of remedies precluding appellant's suit, and that appellant had failed to put forth sufficient evidence of an intentional tort. The trial court granted the motion for a directed verdict on both of appellee's grounds. Additional pertinent facts are discussed under the relevant assignments of error.

Appellant's first assignment of error asserts that the trial court erred in denying her motion to compel discovery of certain documents prepared by Rolf Katzenstein. The trial court denied appellant's motion to compel these documents without stating its exact rationale. However, it is apparent that the trial court was relying on, at least, one of the arguments in appellee's memorandum contra appellant's motion to compel in denying the request for documents prepared by appellee pertaining to the accident.

Appellee stated that both the work product and attorney-client privileges applied to the documents requested. Assuming, arguendo, that the attorney-client privilege would not apply to documents prepared by Rolf Katzenstein in that he had never taken a bar examination and was, therefore, not legally an attorney, nevertheless we find merit in the alternative ground argued by appellant.

Under the Civil Rules, material prepared for litigation or trial is conditionally privileged. This work product privilege extends to those documents prepared "with an eye toward litigation." *Hickman v. Taylor* (1947), 329 U.S. 495; *Stix Products Inc. v. United Merchants and Manufacturing, Inc.* (S.D.N.Y. 1969), 47 F.R.D. 334. The documents prepared by appellee regarding the accident falls within this broad definition. However, a party may obtain discovery of documents and tangible things prepared in

anticipation of litigation or for trial by or for another party upon a showing of good cause. Civ. R. 26(B)(3).

In discussing the similarly worded federal rule, the Federal Rules Advisory Committee has stated that courts will consider the likelihood that the party, even if he obtains the information by independent means, will not have the substantial equivalent of the documents he seeks, calling attention to those witnesses who are hostile, have a lapse of memory, or were probably deviating from prior testimony. Adv. Comm. Note to FRCP 26; *Hauger v. Chicago, Rock Island & Pacific R.R.Co.* (7th Cir. 1954), 216 F. 2d 501. See also *Guilford Nat'l. Bank v. Southern R.R.Co.* (4th Cir. 1962), 297 F. 2d 921.

In the instant case, there is nothing to suggest that Mr. Katzenstein was hostile, forgetful or deviating from prior testimony when he was deposed by appellant. Thus, we do not believe that appellant has shown "exceptional features which made the requested disclosure necessary in the interest of justice", *Jira v. Erie Lackawanna R.R. Co.* (1970), 25 Ohio Misc. 161, and, therefore, the good cause exception to the work product privilege would not seem applicable.

Moreover, although appellant assigned the trial court's action as error, she did not separately argue this assignment of error except with respect to an argument against the applicability of the attorney-client privilege in her reply brief. In lieu of argument, appellant filed a motion in this court to provide her with the documents requested and filed an additional motion to supplement her brief when that motion was ruled upon. A unanimous order of this court denied both motions. In that we can disregard errors not specifically pointed out in the record

and separately argued by brief, pursuant to App. R. 12(A), *State v. Craft* (1977), 52 Ohio App. 2d 1, appellant's first assignment of error is overruled.

Appellant's second assignment of error asserts that the trial court erred in directing a verdict in favor of appellee on the ground that the application for and receipt of workers' compensation benefits precluded a common law suit against appellee. R.C. 4123.74 provides, in pertinent part, as follows:

> "Employers who comply with Section 4123.35 of the Revised Code shall not be liable to respond in damages at common law or by statute for any injury . . . received or contracted by any employee in the course of or arising out of his employment for any death resulting from such injury. . ." See also Ohio Const. Art.II, Sec. 35.

Neither Section 35, Article II of the Ohio Constitution nor R.C. 4123.74 precludes an employee from seeking damages at common law against his employer for an intentional tort. *Blankenship v. Cincinnati Milacron Chemicals* (1982), 69 Ohio St. 2d 608. The receipt of workers' compensation benefits does not preclude an employee or his representative from pursuing a common law action for damages against this employer for an intentional tort. *Jones v. VIP Development* (1984), 15 Ohio St. 3d 90, Syllabus Two. Thus, under the holding in *Jones*, appellant's second assignment of error is sustained.

Appellant's third assignment of error contends that the trial court erred in directing a verdict in favor of appellee on the ground that appellant had failed to produce sufficient evidence that appellee had committed an intentional tort. As intentional tort is an act committed with the

intent to injure another, or committed with the belief that such injury is substantially certain to occur. *Jones,* supra, at Syllabus One; Prosser & Keeton, Law of Torts (5th Ed. 1984) 36, Sec. 8; *Payne v. Vance* (1921), 103 Ohio St. 59; 1 Restatement of the Law, 2d, Torts (1965) 15, Sec. 8A.

In the case at bar, the trial court, in ruling on appellee's motion for a directed verdict, determined that for appellee to be guilty of an intentional tort, "there must be evidence of a specific intention whether by direct evidence or by inference to injure the employee who was injured or at least the class of employee who was injured." However, the Ohio Supreme Court in *Jones,* supra, at 95, stated:

> "(A) Specific intent to injure is not an essential element of an intentional tort where the actor proceeds despite a perceived threat of harm to others which is *substantially certain* . . . to occur."

Therefore, the trial court applied the incorrect standard in directing the verdict in favor of appellee. Appellant must merely demonstrate that the appellee employer allowed employees to tow dual glider assemblies in the manner they had been proceeding despite a belief that injury was substantially certain to result. *Jones,* supra.

Pursuant to Civ. R. 50(A), on a motion for a directed verdict the court must construe the evidence most strongly in favor of the party opposing the motion and can only grant the motion if reasonable minds can only come to one conclusion and that conclusion is adverse to the party opposing the motion. In the instant case, one of appellee's representatives, Terminal Manager Don Schuettenberg admitted that the procedure in towing with regard to three

men had been used prior to the incident causing Roy Whisler's death. Appellee's Safety Director Rolf Katzenstein noted that such procedure was hazardous and that Schuettenberg was responsible for safety on the terminal level. Even the trial court noted that "clearly there is evidence that there was corporate knowledge of the manner in which this was being done and nothing was done about it." The difference in the use of two men in towing the dual glider assembly rather three men in the case at bar is an appropriate factor to be considered in the jury's ultimate resolution of the question of liability. In that we find that the trial court applied the incorrect definitional standard for "intentional tort" and that reasonable minds could differ as to whether an intentional tort was committed by appellee in the instant case, appellant's third assignment of error is sustained.

Appellant's fourth assignment of error argues that the trial court erred in ruling that evidence of application for and receipt of workers' compensation benefits was admissible at trial. We disagree. Appellant apparently stipulated to the fact that there had been an application for and a receipt of workers' compensation benefits. Additionally, appellant's counsel repeatedly asked the decedent's wife about the application for and receipt of those benefits and inquired of her expert witness, an actuary, as to the effect upon economic loss of those benefits. Finally, in that this evidence never came before the jury upon the trial court's erroneous grant of appellee's motion for a directed verdict, any error in admission of this evidence did not result in prejudice. Appellant's fourth assignment of error is overruled. On remand, however, appellant is entitled to a cautionary jury instruction that the application for and receipt of workers' compensation benefits is of

no consequence in determining whether appellee was liable, *Jones,* supra, at Syllabus Two, in determining the amount of damages which appellant would be entitled to should the jury find appellee liable. An employer who has been held liable for an intentional tort is not entitled to a setoff of the award in the amount of workers' compensation benefits received by the employee or his representative. *Jones,* supra, at Syllabus Three. For the foregoing reasons, in that appellant's second and third assignments of error have been sustained, the judgment of the trial court is reversed and remanded for proceedings in accordance with this opinion.

It is ordered that (appellant) recover of (appellee) their costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

JUDGMENT REVERSED

/s/ EARL E. STEPHENSON
Presiding Judge

ABELE, *J.*, Dissents:

GREY, *J.*, Concurs:

[Appendix to Court of Appeals Decision]

(Dated March 7, 1984)

Case No. 82 CI 598

IN THE COURT OF COMMON PLEAS
Ross County, Ohio

CAROLYN A. WHISLER, Administratrix of the Estate of Roy W. Whisler, Deceased,
Plaintiff,

vs.

DALLAS & MAVIS FORWARDING CO., INC.,
Defendant.

JUDGMENT ENTRY

This matter came on to be heard as assigned before a jury duly impaneled and sworn beginning on Monday morning, February 13, 1984.

At the conclusion of the Plaintiff's evidence on February 14, 1984, Defendant moved to dismiss Count 1 of the Complaint, the survival action for pain and suffering, and construing the evidence most favorably to the Plaintiff, the Court finds that there is an issue of fact for the jury, and it is therefore ORDERED that such motion be, and hereby is, overruled.

The Defendant further moved the Court to direct a verdict in favor of the Defendant upon the entire Com-

plaint herein because there was no genuine issue of fact and that Defendant was entitled to judgment as a matter of law.

Construing the evidence most favorably to the Plaintiff, the Court, for the following reasons, finds that said motion for a directed verdict is well taken and should be sustained. The Court finds that the decedent's spouse has applied for and received Ohio Workers' Compensation benefits for herself and her children as a result of the incident resulting in Plaintiff's decedent's death made the basis of this suit. As a result thereof, the Court finds that the Plaintiff has made an election of remedies and is therefore barred from and estopped to bring this action. The Court further finds that construing the facts most favorably to the Plaintiff, there is no fact upon which reasonable minds could differ which would support a finding that the Defendant committed an intentional tort proximately resulting in injury and/or death to the Plaintiff's decedent.

WHEREFORE, it is hereby ORDERED, ADJUDGED AND DECREED that the motion for the directed verdict in favor of the Defendant be, and hereby is, sustained and that final judgment be, and hereby is, rendered in favor of the Defendant. Costs assessed against the Plaintiff. Exceptions to the Plaintiff.

/s/ NICHOLAS H. HOLMES
Judge

APPROVAL:

/s/ MARK PRESTON
Counsel for Plaintiff

Not Approved
Counsel for Defendant

ENTRY OF THE OHIO SUPREME COURT DENYING MOTION FOR REHEARING

(Dated September 10, 1986)

Case No. 86-729

THE SUPREME COURT OF OHIO
COLUMBUS

CARL W. VIOCK, *et al.*,
Appellees,

v.

STOWE-WOODWARD COMPANY,
Appellant.

REHEARING ENTRY

It is ordered by the Court that rehearing in this case be, and the same is hereby, denied.

/s/ FRANK D. CELEBREZZE
Chief Justice